L.B.&B. Associates, Inc. and Olgoonik Logistics, LLC, a joint venture d/b/a North Fork Services Joint Venture *and* Local 30, International Union of Operating Engineers, AFL–CIO. Cases 29–CA–25511, 29–CA–25668, 29–CA–25762, 29–CA–25777, and 29–CA–25779

April 28, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On August 9, 2004, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified below and to adopt the recommended Order as modified below.

Background

Operating under the auspices of the Department of Homeland Security, the Plum Island Animal Disease Center, located off Long Island, New York, studies exotic animal diseases. The Respondent operated and maintained Plum Island's various operating systems, including transportation and ferry boat operations, the power and chiller plants, refrigeration systems, HVAC systems, the decontamination and wastewater treatment units, and food services and administration. As detailed in the judge's decision, the unit employees commenced an economic strike on August 14, 2002. Seven months later, on March 21, 2003,[3] the Union made an unconditional offer to return to work on their behalf. On June 20, the Respondent discharged employee James McKoy.

The judge found that the Respondent violated Section 8(a)(3) and (1) by discharging McKoy. We agree with that conclusion, as explained below. The judge also found that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate nine former strikers after the Union made an unconditional offer to return to work. We adopt, without further comment, the judge's findings regarding former strikers Letavec, Weinmiller, and Borrusso. We also adopt, for the reasons stated herein, the judge's findings regarding former strikers Bumble, Siemerling, Patenaude, and Soullas, and her findings concerning the Respondent's refusal to reinstate former striker Kerr to a vacant ordinary seaman position. However, we reverse the judge's findings that the Respondent unlawfully refused to reinstate former striker Occhiogrosso and unlawfully refused to reinstate Kerr to a vacant master position.

A. The Discharge of James McKoy

The Respondent hired longtime union member James McKoy in November 2002 to replace a striking employee. McKoy worked in the island's chiller plant. The Respondent was not aware of McKoy's union sympathies until June 19, when he posted and distributed union leaflets to employees during his lunch hour. The leaflets, which McKoy prepared in consultation with the Union, encouraged employees to contact the Union if they were concerned about health and safety issues and medical benefits. Utilities Manager Ronald Primeaux instructed McKoy not to distribute the leaflets and prepared a counseling document regarding the incident.[4]

Later that afternoon, at around 1:50 p.m., McKoy left the chiller plant to attend a community meeting at the Plum Island administration building. At the meeting, McKoy asked to speak with Plum Island Director Mark Hollander and an aide to United States Senator Hillary Clinton about his safety concerns. McKoy met with them in Hollander's office, gave them a copy of the union flier, and explained his safety concerns. At 2:20 or 2:25 p.m., McKoy left Hollander's office to return to the chiller plant. Between 2:25 and 2:30 p.m., Primeaux stopped McKoy in an area between the administration building and the chiller plant and asked him where he had been. McKoy replied that he had been with Hollander and the aide, and Primeaux then escorted him to the office of Matthew Raynes, the Respondent's project manager.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] There are no exceptions to the judge's conclusion that the Respondent did not violate Sec. 8(a)(5) and (1) by failing to bargain with the Union over the creation and elimination of certain positions at its Plum Island facility.

[3] Unless otherwise stated, all dates are in 2003.

[4] Primeaux did not give the written counseling memo to McKoy, and there is no allegation that the instruction not to distribute the leaflet or the plan to discipline McKoy were unlawful.

During the ensuing conversation in Raynes' office, McKoy identified himself as a union member and again acknowledged meeting with Hollander and the aide. When asked by Raynes if he had received permission to attend the meeting, McKoy replied that he did not believe he needed permission. Raynes told McKoy his conduct constituted grounds for immediate dismissal. When asked why he had not come to management with his concerns, McKoy replied that he feared being dismissed. Raynes told McKoy that the Respondent was discharging him,[5] but did not explain why. Hollander then appeared, and after a conversation with McKoy, Raynes, and Primeaux, Hollander rescinded the termination and informed McKoy that he should report for work the next day, at which time they would talk further and decide his fate.

The next day, McKoy reported to work as directed, but was confronted by an armed guard, subjected to a body search, and then escorted to Raynes' office where Primeaux handed him a letter of termination. The letter stated that he was being fired for leaving his work area without his supervisor's permission.

Our analysis of whether McKoy's discharge violated the National Labor Relations Act is governed by the test articulated in *Wright Line*.[6] Under that test, the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the adverse employment action. The elements commonly required to support such a showing are union or protected activity by the employee, employer knowledge of that activity, and union animus on the part of the employer. See *Willamette Industries*, 341 NLRB 560, 562 (2004).[7]

Here, the General Counsel has met his burden of showing that McKoy's union activity was a substantial or motivating factor leading to his discharge. McKoy was a known union supporter, and the timing of his discharge, which immediately followed the Respondent's first knowledge of his union sympathies, supports an inference of animus. See *National Steel Supply, Inc.*, 344 NLRB No. 121, slip op. at 2 (2005) (timing of adverse action indicative of discriminatory motive where discipline issued shortly after employer learned about union campaign and only 1 business day after interrogating employee about union activities). In finding animus, we also rely on the pretextual nature of the Respondent's stated reasons for the discharge and the Respondent's unlawful refusal to reinstate former economic strikers, both of which are discussed more fully below.

Accordingly, under *Wright Line*, the burden shifted to the Respondent to prove, as an affirmative defense, that it would have taken the same action even in the absence of McKoy's union activity. See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). To establish this affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996). We find that the Respondent has failed to carry this burden.

The Respondent asserts that it discharged McKoy because he was absent from his work area without his supervisor's permission. The Respondent's treatment of McKoy, however, stands in stark contrast to its treatment of other employees investigated and disciplined for violations of work rules. Boiler operator Alwin McElroy, who worked in the same department as McKoy, twice falsified his timesheets, an offense warranting immediate discharge under the Respondent's discipline policy. McElroy was only counseled for his first offense, and Respondent investigated the allegations relating to the second offense before discharging him.[8] McKoy, in contrast, was immediately discharged for his first offense without an investigation.

In addition, the Respondent presented no evidence that it discharged or disciplined other employees for being absent from their work area for similar periods of time. Although the Respondent cited as a reason for the discharge the importance of the chiller plant to its operations, the judge found that there was no requirement that the chiller be continuously manned. Moreover, McKoy's coworker in the chiller plant, Joseph Franco, was absent from his work area for more than 45 minutes on June 19,

[5] The Respondent drafted a notice of termination on June 19, but the judge did not find that it was given to McKoy on that day.

[6] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[7] Regarding the *Wright Line* analysis, Member Schaumber notes that the Board and circuit courts of appeals have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as an independent fourth element the necessity for there to be a causal nexus between the union animus and the adverse employment action. See, e.g., *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). As stated in *Shearer's Foods*, 340 NLRB 1093, 1094 fn. 4 (2003), since *Wright Line* is a causation analysis, Member Schaumber agrees with this addition to the formulation.

[8] The only evidence of the Respondent's treatment of McElroy was Primeaux's testimony. Contrary to the Respondent's argument, this testimony is a valid basis for finding disparate treatment even if Primeaux did not testify from personal knowledge. Primeaux, a supervisor and manager, was called by the Respondent as its witness and his testimony concerning McElroy is uncontradicted.

but the Respondent did not follow up on this absence or investigate Franco's whereabouts.

Given the evidence of disparate treatment and the lack of a uniformly enforced rule governing the manning of work stations, we find that the Respondent failed to prove by a preponderance of the evidence that it would have discharged McKoy in the absence of his protected union activities. Rather, we find that the Respondent's stated reason for discharging McKoy was pretextual, and that the facts of this case warrant an inference that the Respondent's true motive was an unlawful one that it wished to conceal. *Richard Mellow Electrical Contractors*, 327 NLRB 1112, 1115 (1999); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (1966). Consequently, McKoy's discharge violated Section 8(a)(3) and (1).

B. The Failure to Reinstate the Former Strikers

1. Francis Occhiogrosso[9]

The judge found that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate Francis Occhiogrosso to a vacant laborer/escort position. We disagree and find this position was not substantially equivalent to Occhiogrosso's prestrike position. Occhiogrosso was a trades helper/laborer when the strike began. His duties included hauling cargo off boats, handling animals, performing building repairs, and landscaping. He also assisted plumbers, electricians, carpenters, painters and masons. In response to new Department of Homeland Security rules, the Respondent created a new laborer/escort position either during or shortly after the strike. The duties of this position included escorting visitors and other workers in secured areas and working as a laborer when not performing as an escort. Because of the sensitive nature of the work done in the Island's laboratories, Plum Island is a secure facility and access to those laboratories is strictly controlled. Consistent with these security requirements, the new laborer/escort position required a limited background investigation clearance (LBI), so that the laborer/escort could accompany visitors and other workers who did not have a LBI in the secured containment laboratories.[10] Prior to creating the position, the Respondent took employees from the labs who had a LBI and assigned them to watch employees of subcontractors at work inside the containment areas. The employees who were thus diverted from their regular duties fell behind in their work. The Respondent first offered the position to former striker Deborah Hopkins, who worked in the laboratories as a glassworker before the strike and had a LBI. Hopkins, however, did not accept. The Respondent subsequently advertised for security escorts.[11] The Respondent had difficulty in filling this new position and eventually abandoned the idea of creating an escort position.

The General Counsel argued that the laborer/escort position was substantially equivalent to the trades helper/laborer position. The judge did not clearly resolve that issue. Instead, she found that it was the Respondent's burden to prove that Occhiogrosso was not qualified for the position and that the Respondent had not carried that burden.

An employer's refusal to reinstate former economic strikers after they make an unconditional offer to return to work violates Section 8(a)(3) and (1) unless the employer can show that his action was due to "legitimate and substantial business justifications. . . ." *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967). The burden of proving the justification is on the employer. Id. However, an employer is not required to reinstate a former striker to any position. Instead, an employer must only reinstate the striker to a substantially equivalent position. As the Board explained in *Rose Printing Co.*, 304 NLRB 1076, 1077–1078 (1991), in order to trigger reinstatement rights, the poststrike job must be substantially equivalent to the prestrike job *and* the former striker must be qualified to perform the poststrike job. In determining whether positions are substantially equivalent, the Board considers, among other things, the level of responsibility, skill level, wages, hours, or working conditions of the positions in question. See *Diamond Walnut Growers, Inc.*, 340 NLRB 1129, 1131 (2003); *Rose Printing*, supra. The Board also considers whether there are any special licensing requirements. *California Distribution Centers*, 308 NLRB 64, 66 (1992).

Applying these principles, we find that the newly created laborer/escort position was not substantially equivalent to Occhiogrosso's prestrike trades helper/laborer position. There is no evidence that Occhiogrosso's prestrike position required a LBI or that he held one. The laborer/escort position thus involved both a higher-level security clearance (an LBI) than Occhiogrosso's prestrike position and the additional duty of escorting visitors and other workers in and out of secure areas. The

[9] Member Walsh does not join in this part of the decision about Occhiogrosso, for the reasons set forth in his partial dissent.

[10] Raynes testified that the limited background investigation took over 1 year to complete. The judge questioned the accuracy of that testimony. However, it is undisputed that it took some period of time to obtain a LBI.

[11] The advertisement read as follows:

> SECURITY WORK WATCH: F/T position for individual to provide security escort to workers in bio-containment facility. Must be able to pass drug/alcohol test and obtain security clearances with USDA.

position therefore was not substantially equivalent. *California Distribution Center, Inc.*, supra. Moreover, it is questionable whether Occhiogrosso was qualified for the laborer/escort position given that there is no record evidence that Occhiogrosso currently possessed a LBI. See id. at 66 (former strikers not qualified for driver-warehouse position because they did not have required commercial driver's license). Accordingly, the Respondent was not required to reinstate Occhiogrosso to this position.

Our dissenting colleague argues that the newly created laborer/escort position was primarily a laborer position, and that the escort duties were merely "incidental." The position's laborer duties were, according to the dissent, "substantially equivalent, if not identical," to that of the trades helper/laborer position. Accordingly, the dissent maintains that the positions were substantially equivalent.

We do not agree with our dissenting colleague's position. The primary function of the laborer/escort position was to escort workers without security clearances who were working in secure areas, as required by Homeland Security regulations. As the judge found, providing the required escort was so time consuming that laboratory workers could not do it without falling behind on their work. Indeed, laboratory workers spent entire days escorting employees. Further demonstrating the importance of the escort function, the Respondent first offered the position to Hopkins, a glassworker who had the LBI required to perform escort work,[12] but no laborer experience. Raynes emphasized that any laborer work was to be performed only when the employee was not escorting other workers.[13] Thereafter, the Respondent abandoned its plan for a laborer/escort worker and instead placed an advertisement for a security escort position that did not even mention laborer duties. In these circumstances, the escort duties were sufficiently significant to preclude a finding that the laborer/escort position was substantially equivalent to the trades helper/laborer position.[14] See *California Distribution Center, Inc.*, supra (new position created in response to new customer's needs not substantially similar to old position where new position required different duty and additional license).

2. Arthur Kerr

We affirm the judge's finding, for the reasons stated in her decision, that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate Arthur Kerr to the position of ordinary seaman. Contrary to the judge, however, we find that the Respondent was not required to reinstate Kerr to the position of full-time master.

The Respondent operates a ferry to transport workers to Plum Island from two locations: Orient Point, New York, and Old Saybrook, Connecticut. To operate the ferry before the strike, the Respondent employed ordinary seamen, ablebodied seamen, and masters, who directed the work of the seamen. Kerr was employed as an ordinary seaman and was occasionally used as a part-time, relief captain or master.[15]

As discussed above, an employer need only reinstate former economic strikers to positions substantially equivalent to their prestrike positions. *Rose Printing*, supra. Moreover, part-time and full-time positions are not substantially equivalent. *Certified Corp.*, 241 NLRB 369, 373 (1979) (temporary part-time position not substantially equivalent to regular full-time position). See also *Highlands Medical Center*, 278 NLRB 1097, 1102 (1986) (finding striker's prestrike full-time position not substantially equivalent to part-time position for reinstatement purposes). Kerr's occasional part-time work as a master does not establish that he held the position of full-time master, and his prestrike position was not substantially equivalent to the full-time master position available after the strike. Therefore, the Respondent was not obligated to reinstate Kerr to a full-time master position. We note, however, that our holding does not preclude Kerr from continuing to work part-time as a master to the same extent that he did before the strike; indeed, the Board's "duty is to ensure that strikers who have unconditionally offered to return to work are to be treated the same as they would have been had they not withheld their service." *Rose Printing*, supra at 1078. Accordingly, the Respondent must offer Kerr the opportunity to work as a part-time relief master, on a nondiscriminatory basis, to the extent such work exists.

[12] Hopkins, like Occhiogrosso, was a former striker. There is no claim that the Respondent acted unlawfully in first offering the position to Hopkins.

The dissent appears to argue that the judge discredited Raynes' testimony that Hopkins had an LBI. We disagree. The judge stated that she did not credit Raynes "concerning the failure to continue the laborer/escort position after it was declined by Hopkins." Although the judge also stated that Raynes was not a reliable witness, and that the "lack of specificity" in his testimony about the laborer/escort position "did not inspire confidence," she did not specifically discredit his testimony concerning Hopkins.

[13] The judge relied on this testimony in her recitation of the facts and there is no indication that she did not credit it.

[14] Because we find that the laborer/escort position was not substantially equivalent to the trades helper/laborer position, it is not necessary to resolve whether Occhiogrosso was qualified for the new position. Thus, we need not address our colleague's assertion that Occhiogrosso was qualified.

[15] Kerr testified that he worked at Plum Island from January 26, 2001 to August 19, 2002, and that his duties included serving as a ferry master once or twice a month when the full-time master was absent due to vacation or sick leave.

3. Charles Bumble

We find, in agreement with the judge, that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate Charles Bumble to the ordinary seaman position. Prior to the strike, Bumble asked for 2 days of accrued vacation time. While he was on strike, however, the Respondent paid Bumble all of his accrued vacation time. Bumble admittedly did not inform the Respondent of this error. He acknowledged at the hearing that the Respondent's policies required the payment of all accrued vacation upon resignation. He also testified that he had not resigned.

On May 22, Bumble saw a help wanted advertisement placed by the Respondent for an ordinary seaman. When he called the Respondent about the position, personnel department employee Patty Browne told him she assumed he had resigned. Bumble denied this and asked whether her assumption affected his standing on the preferential hiring list. She replied that it would not. However, in June, the Respondent offered a vacant ordinary seaman position to an outside hire with a starting date of June 20.

The Respondent argues that Bumble was not entitled to reinstatement because he resigned prior to the strike when he received his accrued vacation pay.[16] We disagree. An employer is not required to offer reinstatement to strikers who have abandoned their employment. In order to establish abandonment of employment, however, an employer must present "unequivocal evidence of intent to permanently sever [the striker's] employment relationship. . . ." *Harowe Servo Controls, Inc.*, 250 NLRB 958, 964 (1980) (quoting *S & M Mfg. Co.*, 165 NLRB 663 (1967)). See also *Augusta Bakery Corp.*, 298 NLRB 58, 59 (1990), enfd. 957 F.2d 1467 (7th Cir. 1992). In *Augusta Bakery*, the Board found that the employer violated Section 8(a)(3) and (1) by denying reinstatement to three strikers who had applied for their pension benefits. The employer argued that by applying for their benefits they had severed the employment relationship. The three strikers testified that they had an economic need to obtain the pension moneys, they did not intend to quit by applying for their pensions, cessation of employment was the only way to obtain their pensions, and they had not worked elsewhere. Under those circumstances, the Board did not find unequivocal evidence of the strikers' intent to permanently sever the employment relationship.

[16] The Respondent also contends that Bumble turned in his security badge in December 2002, further demonstrating that he resigned his employment. However, the sole basis for this assertion is hearsay testimony by Raynes, which the judge implicitly discredited.

Here, the Respondent likewise failed to establish a legitimate business reason for denying reinstatement to Bumble. Bumble did not tell the Respondent that he had resigned. Indeed, he testified that he did not intend to sever his employment relationship with the Respondent by requesting his vacation pay. There is no evidence that he obtained employment elsewhere. Moreover, Bumble only requested 2 days of his accrued vacation pay, a fact which evidences an intent to continue the employment relationship. In these circumstances, neither the Respondent's unilateral decision to give Bumble all of his accrued vacation pay, or Bumble's decision to accept it, establishes that he abandoned his position. *Augusta Bakery*, supra. Finally, on May 22, Bumble told personnel department employee Browne, the Respondent's agent, that he had not resigned.[17] Thus, the Respondent was on notice at least as of that date that Bumble did not intend to resign his employment.

4. Arthur Siemerling

In agreement with the judge, we find that the Respondent failed to reinstate Arthur Siemerling to the position of ordinary seaman in violation of Section 8(a)(3) and (1). Prior to the strike, the Respondent maintained separate classifications called ordinary seaman and ablebodied seaman to man the ferry. Although the U.S. Coast Guard also uses these terms for categories of licensed seamen, the Respondent classified its ferry seamen as ordinary or ablebodied based on experience. The Respondent paid it's ablebodied seamen about $5 more per hour than its ordinary seamen, but did not require them to possess a Coast Guard ablebodied seaman license.[18]

[17] We find that Browne was the Respondent's agent with respect to personnel matters. In determining whether a person is another's agent, the Board applies the common-law principles of agency. See, e.g., *Electrical Workers Local 98 (MCF Services)*, 342 NLRB No. 74, slip op. at 3 (2004); *Pan-Oston Co.*, 336 NLRB 305, 305–306 (2001); *Cooper Industries*, 328 NLRB 145 (1999). Apparent authority is established when the principal's manifestations to a third party supply a reasonable basis for the third party to believe that the principal authorized the alleged agent to do the acts in question. Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief. *Electrical Workers Local 98*, supra; *Pan-Oston Co.*, supra. Here, the Respondent's front desk directed applicants to Browne, who was referred to at the hearing as the Respondent's "personnel person" or "human resources person" and in the Respondent's brief as the person "who handled NFS's administrative and human resources matters." Accordingly, we find that the Respondent supplied a reasonable basis for a third party to believe that it had authorized Browne to act on its behalf.

[18] Under Coast Guard regulations, ablebodied seamen are those who have served on a vessel at least 4 hours per day for 360 days, and have passed proficiency exams and a background check. An individual qualifies for a Coast Guard ordinary seaman license by having fingerprints and a picture taken, and having a drug test on file.

Indeed, the Respondent classified Siemerling as an ablebodied seaman even though he did not have an ablebodied seaman license. Siemerling's duties included starting up the ferry, loading cargo and passengers, checking ID badges, assisting in the wheel house, and maintaining the vessel.

In response to a May 19 poststrike directive from the USDA to abolish the ablebodied seaman position, the Respondent began manning the ferries with only masters and ordinary seamen. The Respondent thereafter hired three outside applicants for the ordinary seaman position and recalled three former ablebodied seamen to the ordinary seaman position. The Respondent did not recall Siemerling.

We agree with the judge that the Respondent's ordinary and ablebodied seaman positions had the same duties and required the same skills.[19] As noted, Coast Guard regulations establish different qualifications for ablebodied seaman and ordinary seaman licenses, but the Respondent did not apply those standards in classifying its ferry employees. The only difference between the two positions was pay.

The Board has recognized that pay differential is a factor in determining whether two jobs are substantially equivalent. See *Diamond Walnut Growers*, supra; *Rose Printing*, supra. In this case, however, the pay differential between the ordinary seaman and ablebodied seaman positions is not a result of a difference in skills or duties. Moreover, the Respondent's claim that the positions are not substantially equivalent is at odds with its decision to recall three other ablebodied seamen—but not Siemerling—to vacant ordinary seaman positions.[20] In these circumstances, we find that the two positions were substantially equivalent, and that Siemerling therefore was entitled to reinstatement to an ordinary seaman position. *Medallion Kitchens*, 277 NLRB 1606, 1614–1615 (1986), enfd. in pertinent part 811 F.2d 456 (8th Cir. 1987) (employer that lawfully modified former strikers' positions was required to offer reinstatement to modified positions despite difference in pay, because they involved same work strikers had performed before strike).

[19] Employee Patenaude, who was employed as a master and ablebodied seaman, testified that ablebodied seamen could perform extra duties, such as splicing line, because of their education. However, he further testified that on the Respondent's ferries both ablebodied seamen and ordinary seamen handle the lines to the same extent and have the same normal duties. The Respondent cites to other testimony to the effect that ablebodied seamen could steer a vessel under the master's supervision while ordinary seamen could not. Viewed as a whole, however, this testimony refers to differences between those holding the different Coast Guard licenses rather than the duties performed by employees in the different classifications maintained by the Respondent.

[20] The Respondent explained that it reinstated the other ablebodied seamen because the Board's Regional Office advised it that the Region viewed the positions as substantially equivalent, but fails to explain why it did not also reinstate Siemerling.

5. Bernard Patenaude

Like the judge, we find that the Respondent's failure to reinstate former striker Bernard Patenaude to his former job or to a substantially equivalent position violated Section 8(a)(3) and (1). Patenaude had worked part time, usually working 2 days per week as a master and 1 day per week as an ablebodied seaman. His job title was ablebodied seaman, however, and he was paid at the master pay rate only when working as a master.

Before the strike, a ferry was routinely docked overnight in Connecticut and many crew members began their workday at the Connecticut dock. After the strike began, the Respondent stopped keeping a boat overnight in Connecticut and only ran one ferry line that started in Orient Point, New York, dropped employees off at Plum Island, and then continued to Connecticut.[21] Although not mentioned by the judge in her decision, vacancies arose in the master position in August after the strike ended, and the Respondent placed help wanted ads in newspapers seeking qualified applicants. Moreover, as the judge's decision makes clear, the Respondent used management personnel, including Transportation Director Henry, who resides in Connecticut, to operate the ferries after the Union's unconditional offer to return to work rather than recall qualified strikers. Indeed, the Respondent did not offer Patenaude reinstatement to any of the advertised positions. On August 21, however, the Respondent did offer Patenaude reinstatement to a vacant full-time ordinary seaman position. Consistent with the change in ferry operations discussed above, the recall notice stated that the position would require him to start and end his day at the Orient Point dock. Patenaude resides in Connecticut and prior to the strike he had begun his day at the Connecticut dock. He declined the Respondent's recall offer because it originated in New York. He stated that he wished to be considered for any other position, especially a part-time position out of Connecticut. Contrary to the Respondent's argument, we find that Patenaude's declining of the full-time OS position originating at the Orient Point dock did not extinguish Patenaude's reinstatement rights because the offer

[21] According to Raynes, the ferry leaves Orient Point at 5:15 a.m. each day for its first run to Plum Island. The ferry then travels to the Connecticut dock, picks up employees, and leaves for its first Connecticut-Plum Island run at 6:15 a.m. The ferry maintains a regular schedule of runs to the Orient Point and Connecticut docks throughout the day. The last run to Connecticut from Orient Point leaves at 10 p.m., and is followed by a final run from Plum Island to Orient Point, where the ferry shuts down for the night.

was not to a position substantially equivalent to his prestrike position.

The judge found that the Respondent violated Section 8(a)(3) and (1) by failing to offer Patenaude reinstatement to a "part-time job where he worked three or four days as a Master or as a Seaman." In addition, the judge found that the Respondent was required to offer Patenaude his prestrike working conditions (i.e., allowing him to report for work at the Connecticut dock) because it failed to establish a substantial and legitimate justification for requiring him to start work in New York.

The Respondent excepts, arguing that the General Counsel did not afford it adequate notice that its failure to reinstate Patenaude to a part-time master/ordinary seaman position was at issue in this case. We find no merit in the Respondent's contention. The complaint alleged that the Respondent failed to reinstate former ablebodied seamen to vacant ordinary seaman positions and that the positions were substantially equivalent. During the hearing, but prior to Patenaude's testimony, the General Counsel amended the complaint to specifically allege that the Respondent failed to reinstate Patenaude to an available master position. In addition, Patenaude testified without contradiction that his prestrike position was as a part-time master/ablebodied seaman and the Respondent makes no claim that this testimony is inaccurate. The Respondent's refusal to reinstate Patenaude to his former position was adequately presented by the pleadings and was, in any event, fully and fairly litigated.

The Respondent further claims that no part-time master/ordinary seaman vacancy existed after the strike. However, there is no evidence that Patenaude's prestrike position has been abolished and the Respondent does not contend that it was. Nor has the Respondent established that the position was filled. To the contrary, its advertisements for vacant master positions discussed above, and its recall offer to Patenaude for an ordinary seaman position, make clear that vacancies did exist.

The Respondent also asserts that it lawfully conditioned its offer of reinstatement to an ordinary seaman position on Patenaude's willingness to report to the Orient Point dock. That the Respondent lawfully changed the ferry starting point from Connecticut to Orient Point during the strike does not relieve it of its obligation to offer Patenaude reinstatement for the following reasons.[22] As noted above, Patenaude and other ferry workers were allowed to start work at the Connecticut dock before the strike. The Respondent admitted that three ordinary seamen and one master residing in Connecticut were employed on the ferry at the time of the hearing. These individuals started their shifts at 6:15 a.m. in Connecticut and ended them, in Connecticut, at 4:15 p.m. Patenaude likewise testified that, prior to the strike, he would normally start work in Connecticut, and that when the Respondent needed him to start work in New York it would make accommodations so that he could do so. Moreover, the Respondent's advertisements for the vacant master positions stated that the jobs were located in "US-NY-NY/CT-Long Island." The Respondent presented no justification or explanation for its refusal to allow Patenaude to start work in Connecticut, consistent with its ongoing practice of allowing other employees to do so.

6. Virginia Soullas

The judge found, and we agree, that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate former striker Virginia Soullas to the chef position she held prior to the strike. Under the collective-bargaining agreement covering the period before the strike began, the Plum Island cafeteria was staffed with a chef and a food service worker.[23] In November 2002, the Respondent began to employ a cook rather than a food service worker. The record does not show that the cook's duties differed from the food service worker's duties. In mid-April, after the Union's unconditional offer to return to work on behalf of the employees, a vacancy arose in the chef position. Rather than recalling Soullas, the Respondent promoted the cook to chef. Although not mentioned by the judge, the Respondent also recalled a food service worker, restoring its staffing to the prestrike chef and food service worker combination.

The Respondent's asserted justification for not reinstating Soullas is that it preferred to promote the cook instead. This justification fails as a matter of law. *Pirelli Cable Corp.*, 331 NLRB 1538, 1540 (2000) (vacancies arising from departure of replacement workers must not be preferentially offered to currently working personnel). See also *MCC Pacific Valves*, 244 NLRB 931, 933–934 (1979), enfd. mem. in pertinent part 665 F.2d 1053 (9th Cir. 1981).

The Respondent argues that an exception to this rule exists when a vacant position formerly held by a striker is filled through internal promotion. In support of its

[22] The General Counsel did not allege that the change in ferry starting location was unlawful. In these circumstances, we do not agree with any implication in the judge's decision that the Respondent was required to establish a legitimate and substantial business reason for the change in the ferry starting point as a defense to the allegation that it unlawfully failed to reinstate Patenaude.

[23] The chef was responsible for planning, purchasing, and preparing meals.

argument, Respondent cites *Overhead Door Corp.*, 261 NLRB 657, 664–665 (1982). The case is distinguishable and provides no support for the Respondent's position. In *Overhead Door*, the employer hired nine new employees during the strike as production employees and assigned them to guard duty. After the strike, the employer reassigned seven of these employees to production work instead of recalling former strikers to fill those positions. The Board found no violation of the Act on these facts. First, the Board found that the hiring of the new employees did not violate those strikers' *Laidlaw* rights who had not made unconditional offers to return to work *before* the new employees were hired and assigned as guards. Second, the Board found that the reassignment of the employees to production work after the end of the strike also did not interfere with the former strikers' *Laidlaw* rights because the reassigned employees were, "in effect, production workers on temporary loan to the supervisor in charge of plant security." Id. at 665. In this case, in contrast, Soullas' chef position was vacant and the Respondent filled it by promoting an active worker instead of recalling her. By doing so, the Respondent violated the Act.[24]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, L.B.&B. Associates, Inc. and Olgoonik Logistics, LLC, a joint venture d/b/a North Fork Services Joint Venture, Columbia, Maryland, and Plum Island, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

"(c) Within 14 days from the date of the Board's Order, offer striking employees Charles Bumble, Arthur Siemerling, Arthur Kerr, Bernard Patenaude, Albert Letavec, Virginia Soullas, Martin Weinmiller, and Robert Borrusso reinstatement to their former jobs or to substantially equivalent jobs."

2. Substitute the following for paragraph 2(d).

"(d) Make James McKoy, Charles Bumble, Arthur Siemerling, Arthur Kerr, Bernard Patenaude, Albert Letavec, Virginia Soullas, Martin Weinmiller, and Robert Borrusso whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. April 28, 2006

_____
Robert J. Battista, Chairman

_____
Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting in part.

I agree with my colleagues in all respects except for their reversal of the judge's findings that the Respondent violated Section 8(a)(3) and (1) by failing to offer reinstatement to Francis Occhiogrosso to the laborer/escort position. I agree with the judge that the Respondent unlawfully failed to offer Occhiogrosso reinstatement to that position, for which he was fully qualified, and which was substantially similar to his former job.

A.

Occhiogrosso was a trades helper/laborer.[1] As a trades helper, he assisted plumbers, electricians, carpenters, painters, and masons. As a laborer, he hauled nitrogen tanks, animal feed and other cargo, handled animals and biological matter, decontaminated trucks, performed building repairs, did landscaping work, cut grass, emp-

[24] We recognize that in *Overhead Door* the administrative law judge characterized the Board's decisions in *Pillows of California*, 207 NLRB 369 (1973) (no obligation to reinstate striker whose job was abolished when her duties were absorbed by other employees and supervisors during the strike and through the time of the hearing), and *Kennedy & Cohen of Georgia*, 218 NLRB 1175 (1975) (no obligation to reinstate striker where position filled by transfer for nondiscriminatory reasons of supervisor to nonsupervisory sales position) as establishing the following rule:

> An employer faced with requests by economic strikers to return to work may lawfully fill vacancies which arise in his plant by the nondiscriminatory transfer, promotion, or demotion of employees already working, so long as it does not hire new employees to fill the slots vacated by in-house transfers.

261 NLRB at 664. Here, we find that the Respondent did fill the position vacated by the cook when it recalled the food service worker. Moreover, the statement in *Overhead Door* quoted above is dicta at best, as the case did not involve any issue of promotion, demotion, or transfer for the reasons stated above. *Kennedy & Cohen* is also distinguishable, as there was no claim in that case that the employer filled the vacancy created by the transfer. In these circumstances, the judge's dicta in *Overhead Door* provides no justification for the failure to reinstate Soullas.

[1] Although there are no exceptions to the judge's finding that Occhiogrosso was a "trades helper/laborer," the bargaining unit description contained in the parties' most recent collective-bargaining agreement (that expired prior to the events herein), and acknowledged in pertinent part by the Respondent in its answer to the complaint, does not contain a "trades helper/laborer" position. And while there is a "trades helper" position, without more, there is no "laborer" position, without more. (The unit description does, however, contain "laborer/ground maintenance" and "labor supporter/janitor" positions.)

tied ashes out of the decontamination area, emptied air locks, and did laundry.

During or shortly after the strike, the Respondent created a laborer/escort position.[2] The laborer/escort position was essentially a laborer position, with some incidental escort duties tacked onto it. As contemplated by the Respondent, the laborer/escort would from time-to-time be required to escort and remain with employees of Government subcontractors who did not have security clearances while the latter worked in restricted biocontainment areas. At all other times, the laborer/escort would perform laborer duties throughout the facility.[3] These laborer duties were substantially equivalent, if not identical, to the laborer duties of Occhiogrosso's trades helper/laborer job. They required substantial skills, and would benefit from experience. The escort duties, on the other hand, required neither skills nor experience, and in the past had been performed on an ad hoc basis by laboratory employees who had LBI clearances and who were temporarily pulled away from their regular duties to act as escorts.

Notwithstanding Occhiogrosso's immediate availability for recall to work, and his presumed skill and demonstrated experience as a laborer at the Plum Island facility,[4] the Respondent never offered him the laborer/escort job. Instead, it offered it to Deborah Hopkins, who, according to the Respondent itself, had been a glassware worker responsible for cleaning, maintaining, ordering, and reordering glass beakers, test tubes, etc., in support of scientific work, and who had *no laborer experience whatsoever*.[5] The Respondent's Plum Island project manager, Matthew Raynes, ultimately testified that Hopkins did, however, have an LBI clearance.[6] But there is no showing or even inference in the record that Occhiogrosso did not *also* have an LBI clearance, or at least the capability to get one.[7]

In short, the "laborer/escort" position required skill and experience of a laborer, of which Occhiogrosso had plenty and Hopkins had none. It also required an LBI clearance, which Hopkins may have had, and which, as far as the record shows, Occhiogrosso also either had or at least could get. But when Raynes was asked at the hearing for the reason why he did not offer the laborer/escort job to Occhiogrosso, he testified only "I don't have a reason," and he testified that he did not know whether Occhiogrosso had an LBI clearance.

Hopkins declined the laborer/escort job offer. About 3 months later, still without offering Occhiogrosso the job, the Respondent ran a job advertisement for "SECURITY WORK WATCH," offering a full-time job providing security escort of workers in biocontainment facilities. The ad said that applicants "[m]ust be able to . . . obtain security clearance with USDA," but it did not say that applicants had to already have one, and it did not mention anything at all about laborer duties. Eventually, the Respondent abandoned its plan for a laborer/escort position, and simply resumed its past practice of occasionally pulling laboratory employees with LBI clearances off their jobs to act as escorts.

B.

My colleagues have correctly set forth the applicable legal principles. An employer's refusal to reinstate former economic strikers after they make an unconditional offer to return to work violates Section 8(a)(3) and (1) unless the employer can show that his action was due to "legitimate and substantial business justifications. . . ." *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967). The burden of proving the justification is on the employer. Id. However, an employer is only required to reinstate the striker to a substantially equivalent position. In order to trigger reinstatement rights, the poststrike job must be substantially equivalent to the prestrike job. *Rose Printing Co.*, 304 NLRB 1076 (1991).

The judge found that the Respondent failed to carry its burden of establishing that the laborer/escort job was not substantially equivalent to Occhiogrosso's former trades helper/laborer job, or that Occhiogrosso was not qualified for the laborer/escort job. More specifically, the judge repeatedly referred to Raynes' testimony that he did not have a reason for why the Respondent did not offer the laborer/escort position to Occhiogrosso. The

[2] Like a "laborer" position, the unit description also does not contain an "escort" position.

[3] The laborer/escort would also be required to have or obtain a security clearance, based on a limited background investigation (herein, an LBI clearance).

[4] The judge found that there is nothing in the record to show that Occhiogrosso was anything other than a satisfactory and dedicated employee; the Respondent does not except to that finding.

[5] Indeed, the Respondent specifically excepted to the judge's apparently unsupported findings that Hopkins was a laborer and had previously worked as a "laborer cleaning glassware." Hopkins did not testify, and there is no evidence that she ever performed laborer duties.

[6] Nevertheless, Raynes' testimony on this point was somewhat equivocal. He first testified only that it was his "understanding" that Hopkins had an LBI clearance. Subsequently, the judge asked Raynes "But she had the clearance, is that correct?" to which Raynes responded "Yes, she did. Yes." In any event, the judge ultimately found that Raynes was not a credible witness and that the lack of specificity in his testimony about the laborer/escort position did not inspire confidence. Hopkins did not testify. The judge did not make a finding that Hopkins had an LBI clearance.

[7] Having an LBI clearance at time of application was not a prerequisite for eventual hire. The Respondent's job offer to Hopkins stated in pertinent part that "[a] return to work date will be established by the Company upon successful completion of the drug/alcohol test *and criminal background check*." (Emphasis supplied.)

judge also referred to Raynes' testimony that he did not know whether Occhiogrosso had an LBI clearance. Thus, the judge found that the record failed to establish that Occhiogrosso did not have an LBI clearance.[8] Consequently, the judge concluded that the Respondent unlawfully failed to recall Occhiogrosso to the laborer/escort job. I agree.

C.

In reversing the judge, my colleagues find that the laborer/escort position was not substantially equivalent to Occhiogrosso's former trades helper/laborer position, on the grounds that the laborer/escort position required an LBI clearance and the escorting of people in and out of secure areas, while Occhiogrosso's former job assertedly did not require either of those things.[9] But the laborer/escort position was essentially a *laborer* position, with some incidental escort duties tacked onto it. And the laborer duties of the laborer/escort job were substantially similar, if not identical, to the laborer duties of Occhiogrosso's former trades helper/laborer job. Consequently, the laborer/escort position was substantially equivalent to Occhiogrosso's trades helper/laborer job.

Nevertheless, my colleagues say that Raynes emphasized that the laborer duties of the laborer/escort position were to be performed only when the incumbent was not escorting other workers. First of all, that is a truism, and the converse is equally true: the escort duties were to be performed only when the laborer duties were not being performed. Beyond that, in relying on Raynes' testimony about the laborer/escort position, my colleagues are relying on the testimony of a witness who the judge expressly and generally discredited, and whose testimony about the laborer/escort position the judge found to be unspecific and particularly unreliable.

Occhiogrosso was obviously well qualified by experience and skill to perform the laborer duties of the laborer/escort job, and there is no showing that Occhiogrosso was somehow not qualified to perform the escort duties of that job. My colleagues find, nevertheless, that Occhiogrosso was not qualified for the laborer/escort job because the record does not show that he had an LBI clearance. But the record also does not show that he did *not* have one, and to the extent that the absence of an LBI clearance could be construed as an immediately disqualifying factor, it was the Respondent's burden to establish that Occhiogrosso was so disqualified. It failed to do so. In any event, as seen above, the absence of an LBI clearance was actually not an immediately disqualifying factor. When Hopkins was offered the laborer/escort job, she was not told that she had to presently have an LBI clearance. Rather, she was told that her actual return to work date would be established *upon successful completion* of, inter alia, the criminal background check. Similarly, the Respondent's subsequent job ad simply required that applicants be *able to obtain* a USDA security clearance. Thus, even if it turned out that Occhiogrosso did not have an LBI clearance at the time that the Respondent could have offered him the laborer/escort job, there was no requirement that he have one at that time, and no showing that he could not get one.

I would adopt the judge's unfair labor practice finding in regard to Occhiogrosso.

Dated, Washington, D.C. April 28, 2006

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 30, International Union of Operating Engineers, AFL–CIO, or any other union.

[8] Nor does the record show that Occhiogrosso was incapable of getting one.

[9] While my colleagues note that there is no evidence that Occhiogrosso's trades helper/laborer position *required* an LBI, I note, on the other hand, that there is no evidence that it did *not* require an LBI. Indeed, Occhiogrosso's trades helper/laborer duties, outlined above, reasonably imply that he had broad access within the Plum Island facility, reasonably including unescorted access to secure areas in the course of performing his repair, maintenance, and laborer work. In any event, my colleagues' conclusion that the new laborer/escort position required a higher security clearance than Occhiogrosso's trades helper/laborer position is not based on the record.

WE WILL NOT fail to reinstate striking employees to their former jobs or to substantially equivalent jobs when vacancies arise in those positions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer James McKoy full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make James McKoy whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of James McKoy, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL, within 14 days from the date of this Order, offer striking employees Charles Bumble, Arthur Siemerling, Arthur Kerr, Bernard Patenaude, Albert Letavec, Virginia Soullas, Martin Weinmiller, and Robert Borrusso reinstatement to their former jobs or to substantially equivalent jobs.

WE WILL make Charles Bumble, Arthur Siemerling, Arthur Kerr, Bernard Patenaude, Albert Letavec, Virginia Soullas, Martin Weinmiller, and Robert Borrusso whole for any loss of earnings and other benefits resulting from our failure to reinstate them, less any net interim earnings, plus interest.

L.B.&B. ASSOCIATES, INC. AND OLGOONIK LOGISTICS, LLC, A JOINT VENTURE D/B/A NORTH FORK SERVICES JOINT VENTURE

Henry Powell, Esq., for the General Counsel.
Stephen J. Sundheim, Esq. (Pepper, Hamilton, LLP), of Philadelphia, Pennsylvania, and *Benjamin N. Thompson, Esq.* and *Jennifer Miller, Esq. (Wyrick, Robbins, Yates, & Ponton, LLP),* of Raleigh, North Carolina, for the Respondent.
Marty Glennon, Esq. (Meyer, Suozzi, English & Klein, P.C.), of Melville, New York, for the Union.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in Brooklyn, New York, on 6 days from October 28, 2003 to January 22, 2004. The complaint alleges that Respondent, in violation of Section 8(a)(3) and (5) of the Act, failed to recall striking employees who made an unconditional offer to return, terminated an employee because of union activity and refused to bargain with the Union regarding its decision to create and eliminate certain positions at its Plum Island facility. The Respondent denies that it has engaged in any unfair labor practices.[1]

Upon the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties in March, 2004, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a domestic corporation with its principal office and place of business in Columbia, Maryland, and an office and place of business located at Plum Island, New York, is engaged in facility operations and maintenance at the Plum Island Animal Disease Center. Annually the Respondent purchases and receives at its Plum Island facility goods and materials valued in excess of $50,000 directly from firms located outside the State of New York. The parties agree, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 30, International Union of Operating Engineers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Plum Island Animal Disease Center (Center) is a U.S. Government research center studying foot and mouth and other exotic animal diseases.[2] The Center houses a bio-systems containment laboratory. At one time the Center was under the jurisdiction of the U.S. Department of Agriculture but on June 1, 2003 it came under the jurisdiction of the Department of Homeland Security. At the time of the instant hearing Plum Island housed locations of the Department of Homeland Security and two units of the USDA, an animal research service, and an animal health inspection service.

A private contractor is charged with operating and maintaining various systems on Plum Island including transportation, a power plant, a chiller plant, refrigeration systems, HVAC systems, a decontamination unit, a wastewater treatment unit and a water treatment unit. The contractor maintains the administration building and provides food services. For about 7 years L.B.&B. Associates held the contract for operating these support services. On November 4, 2002, the USDA awarded the contract to provide operation and maintenance support for the Center to Respondent North Fork Services, hereafter NFS, a joint venture of L.B.&B. Associates, Inc., and Olgoonik Logistics, LLC. The Respondent began performance on January 6, 2003. The NFS contract ended on December 31, 2003, and a new contractor, Field Support Services, took over responsibility for operations and maintenance of Plum Island. Despite the changes in the identity of the contractors over the years, many

[1] The record is hereby corrected so that at page 948 the references to the words "foyer request" are rendered as "FOIA request."

[2] Plum Island is off the East End of Long Island in the State of New York.

of the supervisors, managers, and other employees on Plum Island retained their jobs with successive contractors.

The unit employees at the Plum Island Animal Disease Center are represented by Local 30, International Union of Operating Engineers. There are over 50 bargaining unit employees. It is undisputed that on August 14, 2002, the employees went out on an economic strike, and on March 21, 2003, the Union made an unconditional offer to return to work on behalf of the unit employees.

The Union and L.B.&B. were parties to a series of collective-bargaining agreements, the most recent of which was effective from October 1, 1997 to September 30, 2001. The appropriate unit herein is:

> All full-time and regular part-time maintenance, operations, and support personnel including carpenter/mason, painter, metal worker, custodian, laborer-ground maintenance, truck driver, motor vehicle mechanic, HVAC mechanic and (USRO), pipefitter, plumber and (USRO), decon plant operator, WW/PW plant operator, boiler operator, electrician (HV) and (USRO), computer monitor/electrician, electronic technician, trades helper, labor supporter/janitor, master, able bodied seaman, ordinary seaman, motor vehicle operator, (Taxi), tractor operator, property accounting clerk II, warehouseman/motor vehicle operator, chef, food service workers, all safety technicians and fire chief/EMT employed by the Respondent at its Plum Island facility, excluding all other employees including secretary, payroll clerk, accounting clerk III, personnel/accounts payable clerk, secretary (quality assurance/safety), safety and occupational health specialist, clerk-typist I, receptionist/customer service, guards, photographer and supervisors as defined in the Act.

Access to Plum Island is by ferry. The record shows that two ferries are operated on a regular basis, and that a third is operated during the calm weather months. The record suggests that one or two of these may have been tied up for repairs at the time of the instant hearing but no complete record was made on this issue. The ferries carry Connecticut residents from a pier in Old Saybrook, Connecticut, to their jobs at Plum Island. New York residents leave from Orient Point on Long Island. About half the Plum Island employees reside in Connecticut and half in New York. A picture ID badge is required to be displayed to embark on the ferry. An unarmed guard controls access to the ferry at Orient Point. At Old Saybrook the crew of the ferry controls access.

The managers and supervisors relevant to this case are:

> Mark Hollander, Director of Plum Island, Department of Homeland Security
>
> Carlos Santoyo, Director of Operations Plum Island, U[.]S. Department of Agriculture
>
> Matthew Raynes, Project Manager for NFS at Plum Island
>
> Ronald Primeaux, Utilities Manager for NFS at Plum Island
>
> Patty Browne, Human Resources Manager or Administrator for NFS at Plum Island[3]
>
> Jennifer Gross, L.B.&.B Human Resources Director
>
> David Henry, Transportation Manager for NFS at Plum Island

[3] Respondent did not call Browne and it did not give her exact title.

B. Termination of James McKoy

1. Background

The General Counsel alleges that James McKoy was terminated because he was a member of the Union and engaged in activities in support of the Union. In substance, the General Counsel alleges that on June 19, 2003, the day McKoy distributed a union flyer and voiced his concerns about health and safety on Plum Island the Respondent learned that he belonged to the Union and the Respondent decided to discharge McKoy. The Respondent asserts that McKoy was fired because he was away from his assigned post without supervisory permission. To decide this part of the case it is necessary to discuss in great detail the testimony of the witnesses and their prior sworn statements. This discussion unfortunately involves following a confusing record of inconsistent testimony by various witnesses.

James McKoy was hired to work as an HVAC mechanic at Plum Island in November 2002, during the strike. McKoy, a longstanding member of Local 30, consulted with the Union before crossing the picket line to accept the job. McKoy spoke to the union dispatcher and to the business manager and McKoy agreed that he would report to the Union about conditions on Plum Island. From November 2002 to June 2003, when he was terminated by Respondent, McKoy spoke to the business manager about 10 times and he spoke to Marty Glennon, Esq., counsel for the Union, on a weekly basis.

When he was hired, McKoy was given a picture ID and informed that he had to wear it in order to board the ferry. McKoy was given many documents to sign on this occasion, including pages of Respondent's regulations concerning discipline and discharge. McKoy was not given a copy of these regulations, he was not given an employee handbook and the regulations were not posted in any location where they could be consulted by employees. McKoy scanned a document describing Respondent's progressive disciplinary policy before he signed it. Among a list of 37 separate infractions that would prompt progressive discipline but "do not warrant immediate discharge" were "Posting or removing notices on the bulletin board without Company approval" and "Distributing printed material on Company or Customer premises without permission." Also on the list not leading to immediate discharge was "Failure to be at the designated work area ready to work at the regular starting time, including start of shift, after breaks, or after meal-time."[4] The policy listed 33 incidents resulting in "immediate discharge" including drug abuse, fighting, fraud, theft, sabotage, falsifying company records including timecards and "leaving the job or work area during work hours without proper supervisory approval."

McKoy first worked mainly in the biocontainment lab but af-

[4] This list further included "Discussion of salaries of or with other employees."

ter 4 or 5 months he was assigned to the chiller plant.[5] The chiller plant contains cooling towers that remove heat from water in cooling coils. The plant provides cooling services to the laboratories and other areas of the facility. Due to problems with the chiller plant there was concern that it would not operate properly during the summer months. McKoy performed preventive maintenance and fixed specific problems. McKoy had other duties aside from operating and maintaining the chiller plant. He was responsible for air conditioning problems throughout the island and he was called to service individual refrigeration units in the laboratories. Another HVAC mechanic, Joseph Franco, worked with McKoy. McKoy stated that he and Franco were equals on the job. He denied that Franco was his assistant. Franco's testimony in the instant hearing will be described below.

McKoy's hours were 7 a.m. to 3:30 p.m.[6] He did not relieve anyone when he reported for work in the morning and no one relieved him when he left. There were 24-hour log sheets kept in the chiller plant which provided space for recording temperatures and pressures of the various gauges on the equipment. McKoy and Franco kept the logs during their hours of work, but no one filled out the logs in their absence. McKoy stated that if anyone had checked the gauges or the equipment outside of normal working hours they would have entered the information in the 24-hour log sheets. McKoy stated that no one took readings of the gauges in the chiller plant during the weekend. This testimony is wholly uncontradicted on the record.

McKoy testified that he and Franco usually took their 1/2-hour lunchbreak from 12 to 12:30. Before lunch and after lunch they were each entitled to 15-minute coffee breaks. There was no set time for these breaks. During the lunch and coffee breaks no one replaced them in the chiller plant. McKoy also performed tasks on the island in response to work orders for specific repairs and he went around the island to check on various operations during the day. If he and Franco were both out of the chiller plant tending to an emergency or to a work order no one replaced them and no one took readings and filled in the log.

When asked about procedures for keeping in touch with his supervisor, Utilities Manager Primeaux, McKoy replied that he moved about the island without informing Primeaux where he was at all times. If McKoy needed plumbing fittings he could go to the shop without informing the supervisor. McKoy and Franco did not inform a supervisor if they took a bathroom break nor did they inform a supervisor when they were about to go to lunch or on coffee break. They would notify Primeaux as to their whereabouts only if there were an emergency. However, McKoy said if he had become ill and had to leave the island he would have notified his supervisor. On cross-examination by counsel for Respondent McKoy stated that he was not aware that he could be terminated immediately if he left his post for a nonwork-related matter without supervisory permission.

Primeaux testified that he is not always present in his office in the power plant. Employees are not told to check in with him when they begin work. He finds the employees when he wishes to speak to them. He has no set time to assign jobs to employees; they begin work on their own when they report for work. Primeaux said that there are times when he does not know where a particular employee is for an hour. He does not discharge an employee for this reason. Twelve employees report to Primeaux. They keep their own timesheets and give them to Primeaux at the end of each 2-week pay period. Primeaux does not review the timesheets during the week.

McKoy testified that he was concerned about safety and security at Plum Island. McKoy stated that he witnessed the unprotected removal of asbestos covering from a leaking steam line by his then Supervisor Ray Corwin and mechanic John Connelly. McKoy noted that the ferry boats were occasionally undermanned contrary to the Coast Guard certificates posted on the individual boats.[7] He saw that security on Plum Island was lax. He stated that he and a coworker once exchanged their picture ID cards prior to embarking on the ferry in the morning. The two men were permitted to board the boat wearing each others' ID tags and they then worked and circulated on the island all day without challenge. Further, McKoy said that he was permitted to perform repair and maintenance work in the biocontainment area without an escort. Before June 1, 2003, when Homeland Security took over the island from the USDA, he had been permitted to enter the area without any escort. After the takeover, he had to be escorted into the containment area but then he was left alone to work. McKoy did not have the appropriate clearance to work alone in the biocontainment lab. If he had been minded to he could have entered the labs and removed vials of viruses and bacteria. Further, one was supposed to shower in and shower out of the biocontainment area, but apparently McKoy was only told to shower out. McKoy was also concerned that the high rate of employee turnover on the island led to unsafe conditions. McKoy spoke to his various coworkers about these concerns, including Franco, an electrician named Frank and others whose names he did not recall.

Primeaux and Project Manager Raynes testified that on June 19, 2003 they conducted an "all hands" meeting early in the morning to give employees information about health insurance issues. The plan was for Raynes to conduct a series of meetings throughout the day with smaller groups in order to answer questions that individual employees might have about the matter. Primeaux would attend those meetings which involved employees whom he supervised. Primeaux testified that he attended a meeting at 2 p.m. which Franco and McKoy could have attended. Neither of the men attended this session and Respondent has not alleged that either man was disciplined for failing to attend.

2. Events of June 19, 2003

a. Testimony of McKoy

McKoy testified that before June 19, 2003, he had consulted

[5] McKoy's supervisor at the chiller plant was Ronald Primeaux. At the containment area his supervisor had been Ray Corwin.

[6] He took the 3:30 ferry off the island.

[7] McKoy has held a master's license from the Coast Guard for over 20 years. He made an anonymous call to the Coast Guard to complain about the undermanning of the ferry boats.

with a person named Fitzgerald at Local 30 in the preparation of a flyer addressed to Respondent's employees. The flyer read as follows:

ONLY YOU CAN MAKE A DIFFERENCE
TAKE CONTROL OF YOUR LIFE AND CREATE CHANGE

If you are concerned about a safe work environment
If you are concerned about working conditions
If you are concerned about your health
If you are concerned about the community's health
If you are concerned about deteriorating facilities
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McKoy testified that beginning at noon on his lunch hour on June 19, 2003, he distributed copies of this flyer on benches in the decontamination building change room, in the boiler breakroom and in the power plant breakroom.[8] When McKoy walked into the power plant breakroom Primeaux was there having lunch with employees "Mike" and "Randy." He gave all three men copies of the flyer. Primeaux looked at the flyer and told McKoy that he could not do this. McKoy asked Primeaux why if an employee named Rigley had handed out a decertification petition he could not hand out a flyer. Primeaux replied that Rigley had permission but McKoy did not. McKoy also posted a copy of the flyer on the bulletin board in the power plant breakroom. Primeaux asked McKoy whether he was a union member and McKoy said that he was. On cross-examination McKoy restated his recollection that Primeaux had said he was not allowed to hand out the flyers. Primeaux did not say anything to McKoy about posting the flyer on the bulletin board.

McKoy proceeded to the administration building where he put a copy of the flyer in the mailbox of each tradesperson. Then McKoy went to the cafeteria in the administration building and gave a flyer to the various trades employees sitting there including "Ernie," "Franco," "Loper," and "Miles." McKoy noted that the time on the cafeteria clock read 12:25. He finished a soda and went back to the chiller plant with Franco. At about 1 p.m. McKoy left the chiller plant to use the restroom in the administration building.[9] He was gone from the chiller plant about 5 or 10 minutes. Respondent has not cited any rule that employees must have permission to use the lavatory and Respondent offered no testimony that McKoy's absence to use the lavatory was improper. While in the lavatory McKoy ran into a worker whom he recognized from the ferry boat. This person informed him that there was a big meeting in the administration building at 2 p.m. McKoy had previously learned from Glennon that there would be a community meeting on June 19, and that a representative from Senator Hillary Clinton's office would be present, but Glennon had not known the exact time of the meeting. Glennon had suggested that McKoy use his coffee breaktime to attend the meeting. As will be described below, Plum Island Director Hollander was chairing this meeting.

At about 1:50 p.m., McKoy testified, he left the chiller plant and went to the administration building. He did not tell Franco he was going to a meeting and he did not say he was going on his coffee break. McKoy knocked on the door of the room where the community forum was being held and entered, saying, "excuse me." After a person had finished speaking McKoy said that he wanted to speak to the aide from Senator Clinton's office and a representative from Homeland Security about health and safety issues he had observed on Plum Island. Hollander invited McKoy into his office with Rise Cooper, the representative from Senator Clinton's office. McKoy brought a copy of the union flyer to this meeting. McKoy told Hollander that he was concerned about the health and safety of his family, the community, and his coworkers. In Hollander's office McKoy stated his concerns about improper asbestos removal, his ability to work unescorted in the biocontainment lab, his ability to gain access to the ferry and the island wearing another employee's ID, the failure to properly man the ferries, and other issues. Hollander told McKoy that he was glad McKoy had raised these concerns and that they would be addressed. Hollander said all employees could speak to him without fear of being fired.[10] McKoy stated that this meeting lasted about 15 to 20 minutes and ended at about 2:20 or 2:25. He left the administration building and made his way back to the chiller plant. On his way there he met Primeaux in the parking area between the administration building and the chiller plant. Primeaux asked where McKoy had been and McKoy said he was with Hollander and an aide to Senator Clinton. This encounter took place at about 2:25 or 2:30.

On cross-examination by counsel for Respondent McKoy stated that Primeaux did not say he had been looking for him for over an hour.

Primeaux told McKoy to come with him and they proceeded to Raynes' office where they arrived at about 2:35. McKoy was told to remain in Raynes' office while Raynes and Primeaux went outside. After about 5 or 10 minutes Raynes and Primeaux came back in and Raynes asked whether McKoy had permission from his supervisor to leave his post. McKoy said he did not. Raynes said that was grounds for immediate dismissal. McKoy stated that he did not think he had done anything wrong. Primeaux then asked "why didn't you come to us

[8] Attorney Glennon had suggested that McKoy distribute the flyers on his lunchbreak.

[9] There was no lavatory in the chiller plant. A lavatory was available in the power plant but this was in a nasty condition. McKoy said that he used the lavatory in the administration building because it was nice and clean. Respondent did not contradict McKoy's characterization of the various lavatory facilities.

[10] McKoy testified that the USDA "had turned a blind eye" to security issues on the island. McKoy believed that if he made a report about security issues once Homeland Security took over the island he would have the protection of Hollander and the Senator's office and he could not be fired for making his complaints.

with this?" McKoy said he had not come to them because he feared he would be dismissed. Then Patty Browne came in and gave Raynes a paper which Raynes handed to McKoy. This was a notice of termination. Although he was asked to sign it, McKoy refused. According to Respondent's computer records, the notice of termination was "created" on June 19 at 2:53:58 p.m. During this meeting in Raynes' office neither Raynes nor Primeaux asked McKoy how long he had actually been gone from the chiller plant.

On cross-examination by counsel for Respondent McKoy stated that he did not tell Raynes and Primeaux the substance of his conversation with Hollander and Cooper. Raynes and Primeaux did not ask and McKoy assumed that they knew.

Hollander and Carlos Santoyo entered the office and the others left. Hollander told McKoy that he had done the right thing but had not gone about it the right way; McKoy had bent the rules. McKoy denied that he had done anything wrong. Hollander then proceeded to pose a hypothetical question to McKoy, asking him what he would do in Hollander's place. Hollander asked whether McKoy would make an exception for a person because they did the right thing but bent the rules. Hollander told McKoy to go home and think about this and said that they would talk in the morning. McKoy testified that he caught the 3:30 ferry boat off the island and went home.

The next morning McKoy took the usual ferry to work and he was met at the pier by Primeaux and an armed guard. Instead of taking the employee bus which was the usual mode of transportation, Primeaux and the armed guard placed McKoy in a security van and drove to the office of the security manager. The security manager, identified in the record as "Mr. Cusiti," asked McKoy's permission to perform a body search. Cusiti said that if McKoy denied him permission and then reached into his pocket for a pen it could be interpreted as a threatening gesture and McKoy might be shot. McKoy agreed to a body search. Cusiti had him empty his pockets and his briefcase and he searched McKoy "right up to my unmentionables." Cusiti did not testify herein and Respondent has offered no explanation for the search of McKoy. While in the security office McKoy asked to speak to Hollander and was told that Hollander did not want to speak to him.

McKoy then was escorted to Raynes' office where he was given a document headed "Termination Letter" dated June 20, 2003 that stated:

> On June 19, 2003, while on Plum island you left your work area during work hours without supervisor permission. When you originally joined North Fork Services you signed acknowledgement to these rules. Company policy number 5.027 states that this is grounds for immediate discharge.

The letter was signed by Primeaux in place of Raynes who was not present that day.

McKoy again asked to speak to Hollander and the latter came to Raynes' office. McKoy told Hollander that he did not believe he had broken any rules. Hollander replied that this issue was between McKoy and the contractor and that Hollander could not help him. Following this exchange McKoy was driven to the ferry and he left the island.

On cross-examination by counsel for Respondent McKoy stated that he did not know it was grounds for immediate dismissal to leave his post without permission. McKoy did not tell Hollander that he knew he was being fired for leaving his post and he did not tell Hollander that he knew he had broken the rules and that he should be fired. Hollander did not tell McKoy that he was being fired for leaving his post without supervisory permission.

b. Testimony of Joseph Franco

Joseph Franco testified that he is an HVAC mechanic. Franco operates the chiller plant and repairs refrigeration and air conditioning systems throughout the island. There is no indication on the record that Franco is a member of the Union nor that he participated in the strike. Franco testified that he moves around the island without obtaining supervisory approval to leave the chiller plant. There is no set rule on where he is to eat lunch or where to take a break. Franco testified that there is no requirement that someone be in the chiller plant at all times. Franco stated that he and McKoy were equal on the job; McKoy was not in charge of him.

Franco recalled that he worked with McKoy on June 19, 2003. He testified that he saw McKoy in the lunchroom at about 12:15 or 12:20. Franco was not sure whether he and McKoy walked back to the chiller plant to resume work at 12:30 or whether he walked back alone and McKoy came in a few minutes later.[11] Franco testified that he and McKoy worked together in the chiller plant until breaktime at around 2 p.m. Just before breaktime McKoy told Franco that he was going to building 100, the administration building. Franco did not leave the chiller plant for a break that afternoon. Franco recalled that he saw Primeaux twice on the afternoon of the 19. The first time was after the breaktime when Primeaux came in and asked for McKoy. Franco replied that he had gone to building 100. The second time Franco saw Primeaux was about 1/2 hour later when Primeaux again came to the chiller plant looking for McKoy. Franco told him that McKoy had not yet returned. Franco testified that Primeaux never asked him whether McKoy had come back to work after lunch nor whether and when Franco and McKoy had worked together on the afternoon of June 19. No one asked Franco how much time he and McKoy had spent working together in the chiller plant that afternoon.

Franco stated that after McKoy left the chiller plant at about 2 p.m. on June 19, he next saw McKoy at about 3:15 in the lobby of the administration building when it was time to go home.[12] The total time McKoy was away from the chiller plant was about 1-1/4 hours.

c. Testimony of Matthew Raynes

Matthew Raynes was hired as the project manager for Respondent on April 11, 2003.[13] As the person responsible for the day-to-day operations on Plum Island he manages personnel

[11] Franco's affidavit states, "after lunch I went back to the chiller plant and met [McKoy]."

[12] Employees wait for the bus to the ferry pier in the lobby of the administration building near the center doors of the building.

[13] Raynes is now employed by Field Support Services, the new contractor on Plum Island.

engaged in transportation services, utility services, laboratory services, and grounds services. Raynes speaks to Government officials responsible for Plum Island on a daily basis.

On direct examination Raynes testified that he made the decision to terminate McKoy because McKoy, without supervisory permission, had left his position for an extended amount of time when he was not performing any work. Raynes said that other than lunch, coffee breaks and bathroom breaks, McKoy was expected to be working. Raynes said that before he fired McKoy he had no knowledge that McKoy had made safety or security complaints to Hollander or anyone else. He said that McKoy's posting of a flyer had nothing to do with his discharge. Raynes recalled that on June 19, 2003, McKoy left his office just after 4 p.m.

When called by counsel for the General Counsel as a 611(c) witness, Raynes described the events of June 19, stating that at about 12:30 he ended a conversation with Primeaux by deciding that McKoy would receive verbal counseling about the flyer as soon as Primeaux could find McKoy. Raynes established this time by observing that he had another meeting with employees at 12:30 p.m. that day.[14] At the 2 p.m. meeting with the utility employees Raynes asked Primeaux whether he had counseled McKoy. Primeaux replied that he could not find him. Raynes recalled that at this meeting a few people asked what was being done about McKoy's flyer. The meeting ended at 2:30 p.m. and Raynes instructed Primeaux to find McKoy and take care of the counseling. At about 2:45 p.m. Primeaux brought McKoy to Raynes' office. Raynes said that he and Primeaux were going to counsel McKoy for handing out and posting the union flyer. According to Raynes, the Government reviews all documents posted or distributed on Plum Island other than documents on the union bulletin board. When the two men arrived in Raynes' office, Primeaux told McKoy to tell Raynes where he had been and McKoy replied, "None of your business."

After further questioning by counsel for the General Counsel, Raynes changed his testimony and recalled that when Primeaux told McKoy to state where he had been, the latter replied that he had been with Hollander and Cooper. Raynes then asked McKoy if he had permission to leave his work area and McKoy said he did not need permission. Raynes testified that he decided to terminate McKoy when he said he did not have permission from his supervisor and also because McKoy said it was none of Raynes business where he had been. Raynes did not question Franco before he decided to fire McKoy.

Raynes testified that he conferred with his corporate superiors and with Benjamin Thompson, Esq., before deciding to terminate McKoy. He stated that he always informs the Government when he is discharging an employee.

Raynes gave an affidavit on July 24, 2003, to a special agent of the Office of Inspector General, U.S. Department of Homeland Security. This is the document closest in time to the events of June 19. In the affidavit, Raynes states that he left the employee health insurance meeting about 2:30 and informed Primeaux that they should meet with McKoy "with regards to distributing printed matter on government property without permission." Primeaux told Raynes that he had checked McKoy's assigned work area and that he could not find McKoy. Raynes' affidavit goes on to say that McKoy was brought to his office at about 3. The discussion concerning the warning began and Primeaux asked McKoy "where he had been for the past hour or so." McKoy said he had been up to talk to Hollander and the Senator's aide. Raynes asked whether he had informed a superior and McKoy replied, "he felt he didn't need to tell anyone where he was headed."

I note that Raynes is clear that the infraction for which the warning was to be administered is "distributing printed matter on government property without permission." There is absolutely no mention of a restricted bulletin board and no mention of "posting" on a bulletin board.

Raynes' affidavit continues with the information that McKoy was asked to step outside the office. Raynes then consulted with Primeaux about the new infraction. Raynes reviewed the L.B.&B. policy book. He went to Santoyo's office and left a message urging the latter to contact him. After Raynes returned to his office, he spoke with other management officials, including HR Manager Patty Browne and he began to write the letter of discharge. The letter was drafted on a computer and Raynes testified that he "created" it at 2:53:58 p.m. on June 19, 2003.

Raynes' affidavit states that he called McKoy back into his office with Primeaux and informed McKoy that he was being discharged. The affidavit states that McKoy's demeanor "was very calm and matter of fact." Santoyo came to Raynes' office and was informed of the proceedings. Then Hollander appeared and said, "you can't fire him, I just told him he would not get fired." Raynes took Hollander to the security office where they met with other management officials. Raynes told Hollander that the policy dictated that the employee must be discharged. Raynes said he had no choice because, "rules are rules."

Raynes' affidavit goes on to describe Hollander asking McKoy whether he knew that he needed the approval of his supervisor to leave his post and McKoy acknowledging the rule. It also records McKoy's statement that McKoy felt he was a marked man and that no matter what he did they would find a way to get rid of him. Hollander then instructed McKoy to go home and consider what he would do in Hollander's shoes. According to Raynes, Hollander said McKoy "should consider himself unfired and should return to work in the morning and that his fate would be decided by then."

Following McKoy's departure, Raynes' affidavit states, he conferred with various Homeland Security officials who told him that the Government "was in support of the fact that [McKoy] was an employee of North Fork Services and . . . it was our right to discipline our employees."

Two months after the sworn affidavit to the Inspector General, Raynes gave a sworn affidavit dated September 9, 2003, to OSHA in the presence of Benjamin Thompson, Esq., counsel to the Respondent. This later affidavit gives a different version of the events, in some respects more like the testimony Raynes gave in the instant hearing but in some respects different from either of his other accounts. The September affidavit states that

[14] Raynes testified that at the 12:30 meeting some employees had asked him what was going on about the union flyers and Raynes had told them that "it would be handled."

at around noon on June 19, a nameless employee and Primeaux told Raynes that "union flyers were being distributed by McKoy." Raynes then called his corporate office who "gave me the okay to give the written warning to [McKoy] because he failed to get permission prior to posting or distributing any materials." Raynes instructed Primeaux to "do the write up" and arrange to meet with McKoy. Carlos Santoyo, the USDA assistant center director came into Raynes' office with a copy of the "union flyer" and said, "whoever it was had better not been using a government copier." Raynes then left for a 12:30 meeting.

I note that by September 9, Raynes' account of the events has changed from his recollection closer in time to McKoy's discharge. Now Raynes states that McKoy was to be disciplined for "posting or distributing materials without permission." Also, Raynes states that McKoy was to receive a "written warning" not the verbal warning testified to in the instant hearing. Further, it is clear that all involved identified the flyer as a "union" document. There is no mention in this affidavit of a prohibited bulletin board or the availability of a union bulletin board.

Raynes' affidavit describes his 12:30 meeting at which several employees mentioned the flyer. Raynes states, "They wanted to know what was going to be done. Some of the employees were pretty hot. They didn't like the fact that the flyer was being handed out and that the union was getting involved. I told them that I was aware of what was going on and that it was being handled. . . ."

Raynes' affidavit states that he went over to the utilities area at about 1:30 to hold his next meeting. Primeaux was there and informed him that he had not found McKoy. At about 2:30 p.m. Primeaux came to Raynes' office and said he had not found McKoy, and "at about 2:45–3:00 p.m. [Primeaux] walked out. After he walked out [Primeaux] found Jim sitting in lobby waiting for the bus." Raynes' says that McKoy was missing for about 2 hours. I note that Raynes has thus doubled the time that McKoy was said to be away from him [sic] post; when he gave his affidavit in July, Raynes estimated this period as "an hour or so."

Raynes' September affidavit states, "I first became aware that [McKoy] had been in the meeting with Marc Hollander when Marc pulled me out of my office after I terminated [McKoy]." Manifestly, this statement is untrue. Raynes' July affidavit clearly states that when Primeaux first brought McKoy to Raynes' office McKoy told them he had been with Hollander and the Senator's aide. Raynes' September affidavit deviates further from his earlier sworn statement when he says, "I decided to terminate [McKoy] when he answered my question about where he had been with 'I don't have to tell you, it's none of your business.' After [McKoy's] comment I called the corporate office, explained the situation and was given the okay to discharge [McKoy]." As noted above, in July Raynes stated that McKoy told him he had been to see Hollander and the Senator's aide and replied to a question whether he had permission to go by saying he didn't think he had to inform anyone where he was headed.

On cross-examination by counsel for the General Counsel, Raynes said that McKoy was fired because he was away from his post for about 2 hours without his supervisor's permission. Raynes stated that employees need permission to be away from their posts or they have to be working on something that would require them to be away from where they are assigned. Raynes said this policy applies to all employees. Raynes agreed that Respondent's policies and procedures pursuant to which McKoy had been discharged provide on page 1:

> Discharge—All apparent violations will be thoroughly investigated before any disciplinary action is taken.

In response to General Counsel's questions about whether he had followed the policy and conducted a thorough investigation, Raynes at first stated that McKoy admitted in front of Hollander that he had committed a dischargeable offense so Raynes did not have to investigate. Shortly after giving this testimony Raynes changed his testimony. He stated that McKoy was found by Primeaux at around 3 p.m. and that he had made the decision to terminate him at that time because when he and Raynes confronted McKoy and asked where he had been, McKoy said where he was but when they asked him "why" he said it was none of their business. Primeaux and Raynes asked whether he had permission and McKoy said he did not need permission. Raynes said it was "black and white, that was the investigation."[15]

Raynes acknowledged that when he made the decision to discharge an employee named Alyn McElroy for falsifying his timesheets he investigated from May 15 to 23, 2003. This incident is discussed below.

d. Testimony of Ronald Primeaux

Ronald Primeaux is the utilities manager on Plum Island.[16] He is responsible for waste water treatment, potable water treatment, the decontamination plant, the chemical plant, the boiler, and the chiller plant. Primeaux testified that McKoy and Franco worked the day shift in the chiller plant. Primeaux said that McKoy was a very good employee who had never been disciplined. He described McKoy's duties as being 95 percent in the chiller plant, although McKoy also was responsible for air conditioning and refrigeration in the administration building.

Primeaux stated that before June 19, 2003 he did not know that McKoy was engaged in union activity nor that McKoy was concerned about unsafe or unhealthy working conditions and was speaking of his concerns with other employees.

Primeaux testified in response to questions posed by counsel for the General Counsel pursuant to 611(c) that on June 19, he saw McKoy at an all-hands meeting and then again at about 10 a.m. He next saw McKoy in the power plant breakroom distributing flyers and posting one on the bulletin board. This occurred at about 12:10 p.m. Primeaux testified that he picked up a flyer and asked, "What is this?" Primeaux understood that the document was about the Union. Then he went to see Ray-

[15] Manifestly, this was before Hollander came to Raynes' office. Thus, on cross-examination Raynes shifted his testimony whether he made the decision before or after Hollander appeared.

[16] Primeaux was hired by NFS on January 1, 2003 as the decontamination plant manager. He was promoted to utilities manager in May 2003. Primeaux is now employed by Field Support Services.

nes and told him that McKoy attempted to post a "Union flyer" on the bulletin board. Raynes told Primeaux to discipline McKoy. This occurred at about 12:45 p.m.

At I p.m. Primeaux looked for McKoy in the chiller plant. Franco told him that McKoy had said he was going to the administration building. Primeaux described this building as a large, two-story facility which has three entrances, various passageways, mechanical rooms, and many other areas and offices. Primeaux looked for McKoy in the administration building. Not having found McKoy, Primeaux went to the power plant and then to the 2 p.m. meeting with Raynes. After the meeting, at 2:45, Primeaux looked for McKoy in the chiller plant and then he saw McKoy exiting the administration building.[17] Primeaux asked McKoy where he had been. McKoy replied, "I have been with Senator Hillary Clinton's aide and Mark Hollander. Do you know who Mark Hollander is?" Primeaux said, "Follow me."

Primeaux testified that he and McKoy proceeded to Raynes' office which they reached at about 3 p.m. As they entered, Raynes began to deliver the counseling for posting the statement on the bulletin board. Primeaux stopped Raynes and told McKoy to tell Raynes where he had been. McKoy identified himself as a member of the Union and said he had been in Hollander's office. Raynes asked what McKoy had been doing in Hollander's office and McKoy said he did not have to tell him. Shortly after that McKoy was told he would be fired.

After testifying as a 611(c) witness Primeaux testified on direct in response to questions posed by counsel for Respondent. Primeaux said that on June 19, McKoy came to the power plant breakroom and posted a flyer on the bulletin board. When Primeaux asked whether he had permission McKoy said he did not need permission and walked out. Primeaux said that the bulletin board was for notices concerning plant operations and that posting or removing notices without company approval was cause for discipline.[18] After McKoy left the breakroom Primeaux took the flyer off the bulletin board and removed the flyers that McKoy had left on the table and he went to see Raynes whose office was in the administration building. Primeaux told Raynes that McKoy had posted a flyer on the bulletin board in the power plant and Raynes replied that he knew. The two men discussed the violation of company policy. Raynes called the corporate office and spoke to his boss, Jack Hodge, informing Hodge that he was going to counsel an employee. Raynes then instructed Primeaux to counsel McKoy. Primeaux went to his office in the power plant and prepared a counseling document on his computer. Although he was going to give a verbal counseling he needed a written record that it had been done. Primeaux identified the counseling document which he addressed to McKoy. It states:

> Subject: Letter of Counseling with regard to distribution of printed material.
>
> 1. In accordance with North Fork Services—Joint Venture policy, this letter is formal documentation of unacceptable behavior in that you were distributing printed material to co-workers on June 19, 2003. By not having obtained permission from management, your actions were a direct violation of company policy.
>
> 2. While it is not the intent of the company to interfere in your personal life, your actions require this formal company response.
>
> 3. Any additional violations/deficiencies will require a stronger response.
>
> Primeaux denied that McKoy was being counseled because of the nature of his flyer.

Curiously, the document is dated 10/24/2003. Primeaux explained that this date was automatically put on when he pulled it up out of his computer to provide copies. Primeaux also identified a computer document that showed that the counseling file was created June 19, 2003 at 12:47:43 p.m., modified June 23, 2003 at 9:23:38 a.m. and accessed July 18, 2003. Primeaux said he modified the file on June 23 because he had spelled McKoy's name wrong.

I find that the counseling document was created by Primeaux on June 19, 2003 at 12:47 p.m.

Primeaux testified that after he had printed out the counseling document he looked for McKoy in the chiller plant. McKoy was not there, so he asked Franco where McKoy was. Franco said he went to the administration building. Primeaux walked though the administration building without seeing McKoy. He looked through the building twice and "hollered" into the bathroom. Then Primeaux attended the health insurance meeting with Raynes and the utility employees which took place from to 2 to 2:30 or 2:45 p.m. At the end of the meeting, Raynes asked whether McKoy had been counseled. When Primeaux said he had not found him, Raynes instructed Primeaux to find him and bring him to Raynes' office. Primeaux looked in the chiller plant again at about 2:45. He did not see Franco there on that occasion.[19] Franco was not on his scheduled break and Franco had not been at the 2 p.m. health insurance meeting. Primeaux did not follow up on Franco's absence from the chiller plant and he did not reprimand him for being absent. He stated that he was not concerned about Franco because Franco could have been in the administration building. Then Primeaux walked toward the administration building and he met McKoy coming out of the side exit to the building and heading towards the chiller plant. Primeaux denied ever having testified that McKoy was at a bus stop when he found him. This denial will be discussed below.

Primeaux stated that he asked McKoy where he had been. McKoy replied that he was with Mark Hollander and Senator Clinton's aide and he asked, "Do you know who Mark Hollander is?" Primeaux said, "Come with me." Primeaux testified that McKoy was belligerent and he did not speak to McKoy until they had reached Raynes' office. McKoy did not

[17] Primeaux stated that there is no bus shelter at the side entrance where he saw McKoy walking out of the administration building. People wait inside the main lobby, at another entrance to the building, to catch the bus to the piers.

[18] There is a union bulletin board in the administration building.

[19] After giving this testimony Primeaux also testified that he saw Franco in the chiller plant just before the 2 p.m. meeting and Franco said McKoy was in the administration building. This incident is not in any prior sworn statement by Primeaux.

tell Primeaux why he had met with Hollander and he did not mention health or safety concerns about Plum Island. Primeaux testified that when McKoy was told he was being terminated he had no idea that McKoy had been discussing health and safety issues with Hollander.

On cross-examination Primeaux acknowledged that he had read McKoy's flyer when it was posted and he had understood its meaning. When Primeaux took McKoy to Raynes' office he knew that McKoy had posted a union flyer and he acknowledged that he had reason to believe that McKoy was engaged in union activities. Primeaux said he may have asked McKoy whether he was a union member in Raynes' office or McKoy may have volunteered this information. When Primeaux showed the flyer to Raynes he said, "I know." Neither Raynes nor Primeaux asked McKoy how long he had been gone from the chiller plant or how long he had spent at the meeting with Hollander. They did not ask McKoy to document his movements after his lunchbreak. They did not ask McKoy whether he had worked outside the chiller plant. Primeaux said it was possible that he could have missed McKoy while looking for him as he passed through one of the buildings. It was because McKoy said in a "belligerent" manner that he had been with Hollander and Cooper that his superiors did not ask him further questions about his work activities. However, Raynes asked McKoy why he was in Hollander's office and McKoy said he did not have to tell him why he was there.

McKoy was asked to wait outside Raynes' office while he consulted with his superior. Then Raynes informed McKoy that he was being terminated for leaving his assigned work place. McKoy asked to see in writing the policy he had violated. Primeaux stated that he left Raynes' office at about 3:30 p.m.

Primeaux confirmed McKoy's description of his return to the island on June 20. He stated that McKoy had not behaved in an irrational or threatening manner on that occasion.

Primeaux gave an affidavit to OSHA on September 23, 2003, and he amended it on September 25, 2003. Primeaux' sworn statement says, "McKoy's duties are considered critical to Plum Island's operations . . . NFS has at least one HVAC Mechanic constantly standing watch to monitor the chiller system for any problems." Manifestly, this statement is contrary to Primeaux' testimony and the record as a whole. It is clear that both Franco and McKoy were permitted to take 1/2 hour for lunch at the same time, there was no restriction on taking their breaks, and they might both be absent from the chiller plant at other times while performing other functions. Indeed, Primeaux testified in the instant hearing that at one point on June 19 when he looked in the chiller plant he could see neither Franco nor McKoy. He continued searching for McKoy but he did not look for Franco, not did he ask Franco where he had been and how long he had been absent from the chiller plant. Further, McKoy's testimony that the log sheets kept on weekends indicated to him that no one was present in the chiller plant at night or on weekends on a regular basis was not contradicted by Respondent.

Primeaux' affidavit of September 25 says he saw McKoy posting a notice on the Company bulletin board in the breakroom of the power plant. In response to his question whether he had permission to post the notice, McKoy replied that he did not need permission. Primeaux then goes on to say that after drafting a letter to McKoy that his action violated NFS disciplinary policy, he began searching for McKoy at 1 p.m., starting with the chiller plant where Franco told him that McKoy was in the administration building and continuing to that building and then going back to the chiller plant just before the 2 p.m. meeting. The affidavit continues by stating that after 2:30 p.m. he went back to the chiller plant and did not see McKoy and was going to inform Raynes that "I had not been able to locate McKoy for over an hour" when he met "McKoy in the lobby" of the administration building.

Primeaux' affidavit describes McKoy's explanation to him that he had been with Hollander and the Senator's aide. The affidavit states that after he and McKoy arrived at Raynes' office McKoy told Raynes the same thing and added "he was a member of Local 30 and that he had a right to talk to them." In response to Raynes' question whether he had told a supervisor where he was going, McKoy said he did not have to tell anyone where he was headed. I note that, according to this sworn statement, both Raynes and Primeaux knew before Raynes made the decision to terminate McKoy that he had been attending a meeting with Hollander and Cooper and that he was asserting his right to engage in concerted and union activities in attending the meeting. Primeaux' affidavit goes on to state that, "Mr. Raynes asked McKoy why he didn't come to talk to him, and McKoy said because he was afraid he would be fired." From this sworn statement it is clear that Raynes asked why McKoy did not take his concerns to him instead of Hollander and McKoy gave as the reason that he feared retaliation. This question by Raynes, coupled with the fact that only a few hours earlier Raynes had decided to discipline McKoy for distributing a union flyer that mentioned workplace health and safety concerns, convinces me that Raynes knew full well that McKoy had attended the meeting with Hollander to raise those selfsame workplace health and safety concerns. The affidavit states that after reviewing McKoy's actions and the Company policy Raynes and Primeaux told McKoy that leaving his post constituted a terminating offense. McKoy asked, "Where does it say that?" and Raynes showed him the policy. Primeaux concludes his affidavit by stating, "Still to this day, I think McKoy was one of my best employees."

At the instant hearing on January 21, 2004, Primeaux was asked about an October 9, 2003 unemployment hearing before a New York State ALJ. In that hearing Primeaux testified, "It wasn't until probably the point where he was getting ready to catch the boat and I found him in Building 100, in the lobby of Building 100."[20] Manifestly, this is untrue. Primeaux testified repeatedly in the instant proceeding that he had found McKoy in a black top area between a side entrance of the administration building and the chiller plant as McKoy made his way back to work from the meeting with Hollander. McKoy was not in a lobby and he was not near the bus stop for the ferry pier. In the instant proceeding, when confronted with his testimony before the State ALJ, Primeaux stated that he could not recall giving that testimony. In response to questions by counsel for Re-

[20] The administration building is also called building 100.

spondent Primeaux acknowledged that at the unemployment hearing he testified that on June 19 when he brought McKoy to Raynes' office, McKoy "was very belligerent, telling him that he didn't have to talk to us. Didn't have to tell us where he had been or what he was doing."

Primeaux testified that he had terminated an employee named Alyn McElroy for falsifying his timesheets and leaving his position. McElroy claimed on his timesheets that he had worked for 2 days when he had in fact not come to work on the island. McElroy also left his position in the powerhouse and took the boat home without a relief being present on the island. Primeaux testified that he terminated McElroy for these two reasons. However, McElroy's termination letter states that it is for falsifying his timesheet. The letter says that McElroy had previously been counseled for fraudulent recording of time worked on his timesheet. The fraudulent timesheet for which McElroy was discharged was submitted on May 15. An investigation was conducted and he was fired one week later on May 23, 2003.

e. Testimony of Mark Hollander[21]

Mark Hollander testified that he arrived at Plum Island on June 2, 2003 to assume the post of director. He was solely responsible for everything on the island.[22] Hollander stated that while he was stationed on Plum Island he conducted monthly community forums to which community representatives, activist groups and the representatives of elected officials were invited. He did not invite representatives of the Union.

Hollander testified that on June 19, 2003, McKoy entered the room where the community meeting was underway at 2:35 p.m. Hollander repeated several times that McKoy "barged in." When McKoy came in he said he was a member of the Union and he handed Hollander a union flyer. McKoy, Hollander, and Cooper went into Hollander's office. Hollander took notes of what occurred because McKoy stated that he wanted to bring up safety concerns.

Hollander's testimony about what McKoy said was inconsistent. When questioned on direct by Counsel for Respondent, Hollander at first testified that after McKoy identified himself as a union member McKoy said he knew he would be fired for talking to Hollander. Hollander told McKoy that he could not be fired for raising safety and security concerns. When Hollander asked whether McKoy had raised the safety issues with his supervisor, McKoy said he had not because he was afraid of being fired. After counsel for Respondent asked Hollander whether McKoy's supervisors knew where he was, Hollander testified that McKoy had not spoken to his supervisors because "he believed he would be fired for telling them the safety, the security concerns." Then, after counsel for Respondent asked whether McKoy said anything about "being absent, away from his assigned work area to attend the meeting with you," Hollander for the first time testified that McKoy said he would be fired for two things, for talking to Hollander and for leaving his post. On cross-examination Hollander admitted that his affidavit given to the Inspector General of Homeland Security set forth that McKoy told him he would be fired for meeting with Hollander and Cooper but did not say that McKoy said he would be fired for leaving his post without his supervisor's approval. It is evident to me that Hollander has no independent recollection of McKoy acknowledging that he had "left his post" and that he could be fired for such an occurrence. Hollander was only able to testify about the "leaving his post" infraction after being prompted by counsel for Respondent. Further, the "leaving the post" statement was not in Hollander's prior affidavit.

McKoy told Hollander that he had observed the unsafe removal of asbestos covering on pipes, that employees were able to exchange ID passes without being noticed, that he was able to work all day in the biocontainment area without an escort and that there are sometimes more passengers on the boats than is safe according to Coast Guard requirements for crew on the boats. Hollander stated that he met with McKoy for about 20 minutes and McKoy left at about 2:55 p.m. Then Hollander and Cooper spoke for about 15 to 20 minutes before rejoining the community forum.

When asked why, if McKoy said he would be fired for leaving his post, Hollander did not ask who was covering for him and immediately send him back to his post, Hollander said he wanted to hear McKoy's safety concerns. Hollander expressed his belief that the chiller plant was a critical area and that the contract with Respondent provided that someone had to be there 24 hours a day. Hollander stated that it is mandatory that someone be in the chiller plant monitoring it at all times. Hollander did not know that chiller plant employees take breaks, but he said that would be permissible as long as someone was assigned to cover it.

Hollander went to Raynes' office because Santoyo told him that they were firing McKoy. Hollander asked that Respondent not do that until he understood the entire situation. Hollander wanted to know why McKoy was being fired. Hollander testified that he learned that "consistent with the NFS policy, it was for leaving his post." When Hollander saw McKoy in Raynes' office, Patty Browne and Primeaux were there. McKoy said he was being fired for leaving his post. Hollander told McKoy that he was not being fired for reporting safety and security concerns. However, Hollander also testified that he had not spoken to Raynes or Primeaux before he went to see McKoy and he did not explain how he could know why McKoy was being fired. Hollander said he asked McKoy to go home and think overnight about what it meant to leave a critical position unattended.

Hollander testified that he did not discuss McKoy's safety concerns with Respondent because he wanted to do his own investigations. Hollander testified that the issue of escorts in

[21] I observed that Hollander was a distracted and forgetful witness. During the hearing Hollander repeatedly said that he has a hearing problem and that he is easily distracted. He would forget what he was going to say in the middle of a lengthy answer. He often asked for questions to be repeated. Hollander kept complaining that there were people talking in the hall outside the hearing room, that people were walking by and distracting him, and that he could hear a cell phone ringing. Hollander told the ALJ that his concentration is broken by distractions.

[22] Hollander is now based in Washington, D.C. as the Deputy Assistant Secretary for Plans, Programs and Budget of the Department of Homeland Security.

the biocontainment area was "a standing known problem" that has now been solved. Further, the day after he spoke to McKoy, Hollander issued a policy that all ID badges must be taken from an employee and verified to the face.

Hollander testified that the next day, June 20, he was informed that McKoy was being fired. He went to Raynes' office where he told McKoy that he would look into his safety concerns. According to Hollander McKoy said he knew he was going to be fired for leaving his post and he had to do that in order to raise his safety and security concerns. McKoy told Hollander "the rules are the rules."

Copies of Hollander's notes of his June 19 meeting with McKoy were introduced into evidence. Hollander testified that the notes were in different colors because he used different pens to write them. Hollander acknowledged that some of the notes were written after the events described therein. Hollander's notes begin at the top of the page and continue down with headings summarizing the issues raised by McKoy. The notes are headed "Jim McCoy, *union member*." They then continue with subjects such as "*observed* supervisor Ray Corwin & Conley wkg on asbestos line w/o dust mask," "*issue*, security, escort business is eyewash," "*boats*—not properly manned."[23] These notes were written as McKoy was speaking. Hollander testified that sometime after he met with McKoy he added the phrase "Barged into community Mtg—1430 h" right under McKoy's name at the top of the page. Sometime after the summary of McKoy's safety concerns was written, Hollander rotated the page so that he was writing perpendicularly across his earlier notes. He then wrote a series of purported statements by McKoy in quotation marks, each prefaced by a time. Thus, the "crossed" notes begin "1435 1st comt was 'I know Im going to be fired for this' . . . he knew he would be fired for leaving his duty post w/o his supervisors approval." These crossed notes continue down the page and present a time line that has Hollander and Cooper meeting privately at "1455" and returning to the community meeting at "1515." The notes continue with Santoyo entering Hollander's office at "1615" to inform Hollander that McKoy would be fired and go on with Hollander seeing McKoy in the office at "1618" when McKoy said, "I know I will be fired for leaving my post." Hollander testified that he wrote all but the last three crossed notes "as Mr. McKoy was talking." Manifestly, this cannot be correct because some of the crossed notes at the top of the page describe events after McKoy left the office.[24] Further, if Hollander was writing McKoy's safety concerns in one direction on the page while McKoy was speaking he could not at the same time be writing across the page in a different direction and recording a purported "first comment . . . he knew he would be fired for leaving his duty post." The conclusion is inescapable that the writing across the page containing the references to McKoy's leaving his post were written at some time after the meeting with McKoy and after Hollander first learned that Respondent was charging McKoy with leaving his post.

After a careful reading of Hollander's testimony and of his notes, I have concluded that Hollander had no actual recollection of when he wrote the crossed items. I also find that these notes are unreliable. My conclusion is strengthened by the fact that Hollander did not testify orally to any statement by McKoy acknowledging that he would be fired for leaving his post until that thought was suggested to him in a question posed by counsel for Respondent. Thus, I have also concluded that Hollander has no actual recollection that McKoy said anything about being fired for leaving his post and that his testimony is not credible.

I do not credit the times noted nor the substance of these crossed notes. They were put down after the fact by a witness who admittedly is easily distracted and loses concentration. I do not believe that such a witness could construct a precise time line with quotations if he wrote after the events. Moreover, the notes written while McKoy was actually speaking do not have him making any comment about being fired for leaving his post.

3. Discharge of James McKoy, discussion and conclusions

The first question to be answered in a discussion of McKoy's discharge concerns the credibility of the witnesses. One witness had no stake in the outcome of the instant case: Joseph Franco is not identified as a union member and he worked during the strike. In addition, Franco is still employed at Plum Island under the supervision of both Raynes and Primeaux. Thus, if he had any desire to shade his testimony he would have an incentive to favor Respondent rather than the General Counsel. Yet Franco's testimony was consistent with the testimony of McKoy rather than that of Raynes and Primeaux. Franco gave simple, consistent testimony and was not shown to have given prior sworn statements that conflicted with his testimony at trial. Franco impressed me as a credible witness who testified forthrightly about his recollection, and he freely admitted the one instance where he was not certain of a particular detail. I shall rely on Franco's testimony.

James McKoy also testified forthrightly and consistently. McKoy listened carefully to the questions and he answered them precisely. McKoy was cooperative on cross-examination and his testimony was in accord with the documentary evidence. I shall rely on the testimony of James McKoy.

As discussed above, I found that Hollander was not an accurate witness. By his own admission he is forgetful when distracted and he is easily distracted by interruptions. As discussed above, his testimony about how and when he wrote his notes on June 19 is incredible and impossible. I do not believe that his testimony nor his notation of the time at which various conversations occurred is accurate. He has McKoy coming into his meeting at 2:30 or 2:35 p.m. and leaving at 2:55; yet Respondent created McKoy's notice of dismissal at 2:53 p.m. I have also discussed above Hollander's failure to give testimony that is damaging to McKoy until prompted to do so by counsel for the Respondent. I have further discussed above the fact that Hollander's testimony and his prior sworn statements are inconsistent. Because I do not find that Hollander was an accurate and reliable witness, it follows that I do not credit Hol-

[23] McKoy's other concerns are also memorialized in Hollander's notes.

[24] Hollander repeated this assertion twice in response to questions by the ALJ, stating that the only notes he wrote after McKoy left were timed 16:15, 16:18, and 16:30.

lander that McKoy began the conversation by saying he would be fired for leaving his post. Nor do I credit any of the testimony which purported to quote McKoy saying that he deserved to be fired.

As discussed above, the testimony of Raynes and Primeaux was inconsistent, both with their own prior sworn statements and with the documentary evidence. The credibility of both of these witnesses was called into question by their testimony about several crucial elements surrounding McKoy's termination. First, when both of these witnesses testified in the instant trial they were at pains to establish that McKoy was going to be given counseling for "posting" a document on the company bulletin board. Even though General Counsel has not alleged that the intended counseling violated the Act, these witnesses gave extensive testimony designed to show that the intended discipline was for "posting." In fact, the documentary evidence beginning with the June 19, 12:47 p.m. written note of the discipline shows that both Raynes and Primeaux were intending to counsel McKoy for distributing material without prior permission. The documents convince me that they both gave inaccurate testimony about the discipline. Raynes' July 24 affidavit states that McKoy's infraction was "distributing printed matter" without permission.

Next, as shown in detail above, both Raynes and Primeaux gave inaccurate testimony about what happened when Primeaux encountered McKoy coming out of the side entrance of the administration building and heading back towards the chiller plant. At various times prior to the instant hearing, both of these witnesses had stated under oath that McKoy was found in the lobby of the administration building waiting for the bus to take him to the ferry. This purported fact would be much more damaging to McKoy than if he had been found returning to work in the chiller plant. In fact, as Primeaux admitted, he did indeed encounter McKoy returning to the chiller plant.

Both Raynes and Primeaux gave shifting and inconsistent testimony about McKoy's statements to them when he was brought to Raynes' office by Primeaux. McKoy's "attitude" was cited by both Raynes and Primeaux as a reason for not asking him how long he had been at the meeting with Hollander and Cooper. Thus Raynes first testified herein that McKoy said, "None of your business" when Primeaux told McKoy to tell Raynes where he had been. Then Raynes changed his testimony and said that McKoy had indeed answered that he had been with Hollander and Cooper. Primeaux testified that McKoy was "belligerent" when he encountered him leaving the administration building. Primeaux gave this as a reason for failing to ask McKoy how long he had been in the meeting and away from his work duties. But Raynes did ask McKoy why he was in Hollander's office and McKoy replied that he did not have to reveal this. If Raynes could ask this question and get a civil answer he could also have asked McKoy to tell him what work he had done that afternoon and how long he had been away from work. Furthermore, Primeaux' affidavit of September 25 clearly shows that Raynes did indeed ask more questions of McKoy. That affidavit quotes Raynes as asking McKoy why he didn't come talk to him and quotes McKoy as saying that he feared retaliation. This exchange belies the Respondent's claim that McKoy was too belligerent to be questioned about how long he had really been away from the chiller plant and away from his work duties. I note that Primeaux' testimony before the New York State ALJ also conflicts with his September 25 affidavit. As discussed above Primeaux told the State ALJ that McKoy said he did not have to "talk to" his superiors and did not have to tell them where he had been.

As further evidence of inconsistencies in the testimony of Respondent's witnesses I note that Raynes' July 24, 2003 affidavit makes no mention of a belligerent attitude on the part of McKoy. In this affidavit, Raynes' only allusion to the length of time Primeaux could not find McKoy is "an hour or so." Yet Raynes' September 9 affidavit says that McKoy could not be found for about 2 hours.

Many other discrepancies in the testimony of Raynes and Primeaux could be cited based on their testimony described at length above. To give one example, despite Respondent's attempts to describe the chiller plant as a critical location that was subject to constant 24-hour monitoring, this record makes it abundantly clear that there was no such monitoring. No one monitored the equipment and recorded readings in the chiller plant on weekends or at night. With respect to normal working hours, this record shows that Franco and McKoy could be occupied elsewhere on Plum Island for hours at a time and they could both take lunch and coffee breaks at the same time. During these periods there was no one in the chiller plant and neither Primeaux nor Raynes intimated that discipline should be meted out to anyone on these occasions. The record shows that Franco and McKoy moved around Plum Island without telling a supervisor where they were going. The record shows that Primeaux often did not know where his employees were located at a precise moment and he was not concerned about this state of affairs. Primeaux testified that there are times when he does not know where a particular employee is for an hour, but this has not been a cause for discipline. Primeaux looks at employees' timesheets every 2 weeks when they are handed in for payroll.

Another serious discrepancy concerns the "time line" on June 19. Both Raynes and Primeaux testified that McKoy was not found until 3 p.m., thus lengthening the time that he was purportedly away from the chiller plant. But the documentary evidence shows that the discharge document was "created" at 2:53 p.m.; and this was after Raynes had gone to Santoyo's office to leave word and had consulted with counsel and various corporate executives by telephone. Clearly, Respondent's witnesses were engaged in an exercise to make McKoy's absence from the chiller plant seem longer than it had been.

I find, based on the testimony of McKoy and Franco and based on the uncontradicted admissions of Hollander, Primeaux, and Raynes, that the following sequence of events occurred on June 19 and 20.

On June 19, 2003, between noon and 12:25 p.m. McKoy distributed union flyers on Plum Island raising safety and health issues and urging employees to contact Local 30. Primeaux saw McKoy engaged in this activity before 12:30 p.m. and he so informed Raynes by 12:30 p.m. At 12:47 p.m. Primeaux began to write a counseling document to discipline McKoy for distributing the flyers. Santoyo and other employees informed Raynes that union flyers were being distributed. Santoyo and

some of the other employees were upset that union flyers had been given out and Raynes said he would handle it.

On June 19, McKoy and Franco worked in the chiller plant from 12:30 to shortly before 1 p.m. when McKoy went to use the lavatory in the administration building. McKoy returned to the chiller plant in about 10 minutes and worked there with Franco until about 1:50 p.m. when he went back to the administration building to attend at 2 p.m. the community meeting chaired by Hollander and attended by Cooper. McKoy asked to speak to them about health and safety issues on Plum Island. McKoy, Hollander, and Cooper met in Hollander's office. McKoy gave them a copy of the union flyer. McKoy mentioned the issues detailed above relating to security in the labs and on the ferries, manning of the boats, asbestos, and other issues. McKoy said he was afraid of being fired for raising these issues and Hollander said he could speak to him without fear for his job. McKoy left Hollander's office at 2:20 or 2:25 and headed back to the chiller plant. He encountered Primeaux in the black top area between the administration building and the chiller plant between 2:25 and 2:30. Primeaux asked where he had been. McKoy replied that he had been with Hollander and an aide to Senator Clinton.

I find that Primeaux had looked for McKoy after he finished drafting the 12:47 p.m. counseling document. Primeaux looked in the chiller plant, the power plant, and the administration building. Primeaux' recollection of how often he looked in each location and when is not reliable. It is clear that Primeaux did not see McKoy between 12:47 p.m. and about 2:25 or 2:30 p.m. I note that Primeaux testified that it was possible that in looking through the chiller plant and the administration building that he could have missed seeing McKoy. I rely on Franco's testimony that he saw Primeaux in the chiller plant twice, once around 2 p.m. and once about 1/2 hour later. Primeaux probably looked in the chiller plant on another occasion and did not see either Franco or McKoy. Primeaux did not inquire where Franco had been nor ask about his activities.

After Primeaux and McKoy met outside the chiller plant they went to Raynes' office. Primeaux told McKoy to tell Raynes where he had been. McKoy said he had been with Hollander and Cooper. McKoy identified himself as a member of the Union. Raynes asked whether he had permission to attend the meeting. McKoy replied that he did not think he needed permission. Raynes said that was grounds for immediate dismissal. McKoy said he did not think he had done anything wrong. Either Raynes or Primeaux asked McKoy, "Why didn't you come to us with this?" and McKoy replied that he feared being dismissed.[25] This question certainly implies that Raynes and Primeaux had some information about the substance of McKoy's discussion with Hollander and Cooper. If they did not yet know the exact safety and security failings that McKoy had cited they must have known that he was discussing the general subject of safety and security that was raised in the union flyer he had distributed.

McKoy remained in Raynes' office while Raynes and Primeaux left. Raynes conferred with counsel and corporate officials by telephone, and he looked for Santoyo in the latter's office. Raynes reviewed the corporate policy book and began drafting the notice of termination at 2:53 p.m. Raynes informed McKoy that he was being fired. McKoy's demeanor was "calm and matter of fact."

While McKoy was still in Raynes' office, Santoyo and Hollander appeared. Hollander told Raynes that he could not terminate McKoy because Hollander had "just told him he would not get fired." Hollander then told McKoy that he had done the right thing but had bent the rules by not doing things the right way. McKoy said he had done nothing wrong. Hollander asked McKoy what he would do in Hollander's place if a person did the right thing but bent the rules. McKoy said he was a "marked man" and no matter what he did they would find a way to terminate him. Hollander told McKoy that "he should consider himself unfired and should return to work in the morning and that his fate would be decided by then."[26] Hollander told McKoy that they would speak in the morning. McKoy took the 3:30 ferry off the island in company with Franco.

This exchange further convinces me that Raynes knew that McKoy had been discussing safety and security workplace issues with Hollander. Both Santoyo and Hollander had copies of the union flyer. Santoyo had earlier that day mentioned to Raynes that McKoy had better not be shown to have used a Government copier for the union flyer. All of Respondent's witnesses took great pains to state that McKoy was not fired for raising safety and security concerns. Hollander's comment to Raynes that he had promised McKoy he would not be fired makes sense only in the context of an employee raising safety and security concerns. I am convinced that when a supervisor asked McKoy why he had not come to them first and when Hollander told Raynes of his promise it was very clear to Respondent that McKoy had been discussing the safety and security issues in the union flyer with Hollander and Cooper.

Neither Raynes nor Primeaux testified that they would have denied McKoy permission to attend the meeting. In fact, Hollander testified that he told McKoy that it was proper for him to raise the issues that concerned him.

After McKoy left to go home Raynes conferred with Homeland Security officials who told him that it was up to the NFS as the contractor to discipline its own employees.

On June 20, McKoy took the ferry to work. At Plum Island he was not permitted to take the bus with other employees. He was escorted by an armed guard and subjected to a body search. No justification for this action has been asserted by Respondent. Then McKoy was taken to Raynes' office where Primeaux gave him the June 20 letter of termination quoted above.

I find that Respondent had anti-Union animus and that it terminated McKoy because he was a member of the Union and engaged in activities in support of the Union. These activities were distributing a union flyer which raised safety and security concerns and urged employees to contact the Union, and speaking to Hollander and Cooper about these same safety and security concerns. I find that the fact that McKoy was away from the chiller plant for a time when Respondent could not locate McKoy was a pretext for his discharge. Even if this were not a

[25] Primeaux' affidavit says Raynes asked this question but McKoy quotes Primeaux as asking the question.

[26] This is a quotation from Raynes' July 24, 2003 affidavit.

pretext, Respondent has not shown that it would have discharged McKoy for being away from the chiller plant from 1:50 to 2:35 p.m. if he had not been a member of the Union and engaged in union activities. Thus, I find that Respondent violated Section 8(a)(3) of the Act by discharging McKoy. The basis for this finding is as follows.

Respondent was unaware that McKoy was a union member until June 19. On that day, as soon as Respondent became aware that McKoy belonged to the Union, Respondent admittedly intended to discipline McKoy for distributing union flyers in various areas of Plum Island. Respondent's witnesses gave shifting and inconsistent and untruthful testimony with respect to this incident. Also on the same day that Respondent learned of McKoy's support for the Union, Respondent decided to discharge him on the pretext that he had been away from the chiller plant for a period of time which Respondent variously gave as 1 or 2 hours. Again, Respondent's witnesses gave shifting and inconsistent testimony about this incident; the witnesses even provided untruthful statements that McKoy was found preparing to leave the island at 3 p.m. Primeaux testified that he did not consider it a dischargeable offense if he could not find an employee for an hour. Primeaux did not know where Franco was on July 19 from at least 2 p.m. to well after 2:45 p.m. Yet Primeaux testified that he was not concerned about Franco and he did not follow up on his absence or discipline him for being away from the chiller plant. To this day, apparently, Primeaux has not investigated where Franco was during that period and he does not know whether he was working or loafing away from his work area without supervisory permission. The only exception to this rule of not caring what an employee is doing for an hour was the case of McKoy, a known union member and activist. Indeed, Respondent determined to fire McKoy the moment it learned that he had been talking to Hollander and Cooper without asking them how long he had been with them. Contrary to Respondent's own written rules it did not conduct a thorough investigation before determining to discharge McKoy: it never asked Franco or McKoy how long the latter had actually been away from the chiller plant. In the case of McElroy, who was found to have falsified his timesheets on two separate occasions and who left the island without informing his superiors, Respondent conducted a weeklong investigation before firing him. Further, the first time McElroy was found to have fraudulently recorded time worked he was counseled but not discharged. Thus, I find that Respondent's citation of a rule against leaving one's work area is a pretext used to justify McKoy's discharge for union activities. Even if I had not found that Respondent seized upon a pretext to discharge McKoy, I find that Respondent would not have discharged McKoy but for the fact that he engaged in union activities. As discussed above, Respondent counseled McElroy for falsifying his timesheet the first time this occurred. Although the Respondent's policies include "falsifying company records including timecards" as a cause for "Immediate Discharge," McElroy was merely counseled the first time he committed this offense. Moreover, McElroy's offense was more egregious than that of McKoy. McKoy was not performing his duties from about 1:50 to 2:30 p.m. During this time, he was entitled to take a 15-minute coffee break. Thus, at worst, McKoy did not engage in work for 25 minutes during the day when Respondent expected that he was attending to his duties. But McElroy had actually claimed credit for being on the island and working at times when he was not on the island. McKoy did not engage in this type of fraudulent behavior. Respondent has not shown why it did not similarly counsel McKoy the first time it found that he was away from his assigned duties without supervisory permission. This is especially significant in light of the fact that Primeaux affirmed that he had always considered McKoy one of his best employees and still considered him so at the instant hearing. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied, 455 U.S. 989 (1982); *Toll Manufacturing Co.*, 341 NLRB 832 (2004).

I note that Respondent's witnesses kept referring to the fact that McKoy was discharged on June 19, 2003. This is not accurate. On June 19, Raynes told McKoy that he was being discharged but then Hollander told McKoy that the discharge was rescinded. McKoy was told to report the next day when his fate would be decided. On that day, June 20, 2003, McKoy was given a letter of termination dated June 20, 2003. By the time Respondent discharged McKoy on June 20, Respondent not only knew that Respondent was a union member and had distributed union flyers urging employees to contact the Union concerning safety and security issues but it also knew that he had met with Hollander and Cooper and had discussed safety and security issues with them.

C. Failure to Recall Former Strikers

It has long been established that economic strikers who make an unconditional application for reinstatement are entitled to full reinstatement to fill positions left by the departure of permanent replacements. Unless the employer shows a legitimate and substantial business justification for failing to offer reinstatement to a striker the failure to make such an offer is an unfair labor practice without regard to intent or antiunion animus.[27] *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1965); *NLRB v. Great Dane Trailers*, 388 U.S. 26, (1967); *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert denied 397 U.S. 920 (1970). The striker is entitled to reinstatement to his or her former job or to a substantially equivalent job. *MCC Pacific Valves*, 244 NLRB 931 (1979).

1. Francis Occhiogrosso

Francis Occhiogrosso testified that he worked for the contractor on Plum Island beginning in June 1999. He was a trades helper/laborer. Occhiogrosso had "a hundred" duties. He hauled nitrogen tanks and other cargo off the boats, he handled animals, he performed building repairs, he handled biologicals, he did landscaping work and cut the grass, he hauled animal feed, he emptied air locks, he decontaminated trucks, he emptied ashes out of the decontamination area, he did laundry. He also assisted plumbers, electricians, carpenters, painters, and masons. Occhiogrosso was a member of Local 30 who participated in the strike and he was ready to go back to work after the Union's unconditional offer to return in March 2003. The General Counsel asserts that Occhiogrosso should have been re-

[27] The employer bears the burden of proof.

turned to a laborer/escort position a position which is substantially equivalent to the laborer position.

Raynes testified that Respondent's contract with the USDA did not refer to a position titled "escort." When Plum Island was subject to increased security a rule was established that workers going into the containment area had to have an "LBI," or limited background investigation. As a result, Respondent took employees from the labs who had an LBI and assigned them to watch employees of subcontractors at work inside the containment area. The employees who were thus diverted from their regular duties fell behind in their work and Respondent discussed establishing a new "laborer/escort" position for employees with an LBI. Respondent planned that the new employee would do laborer work when not performing escort work. Respondent searched for retirees with an LBI but it could not find anyone willing to work over 30 hours per week. So Respondent sent a notice of recall dated May 7, 2003 offering the laborer/escort position to Deborah Hopkins who had previously worked as a laborer cleaning glassware. Hopkins did not accept the opportunity to return to Respondent's employ. The Respondent ran an ad which read as follows on August 14, 2003:

> SECURITY WORK WATCH: F/T position for individual to provide security escort to workers in bio-containment facility. Must be able to pass drug/alcohol test and obtain security clearance with USDA.

According to Raynes the USDA contract officer, Dennis Foley, said that the head of security had directed that former strikers could not be used as escorts. Raynes identified the head of security as "Mr. Roth" in Washington, D.C. Respondent abandoned the laborer/escort idea and resumed using existing employees with an LBI to watch workers in the containment area. Raynes said that if the position of laborer/escort had in fact been created anyone hired to fill the position would have to possess an LBI. Raynes testified, "I don't have a reason why [Occhiogrosso] wasn't offered that position." Raynes stated that he did not know whether Occhiogrosso has an LBI. Raynes stated that it takes one year to obtain an LBI. It is Respondent's burden to prove that Occhiogrosso is not qualified for the position: in this case that means it is Respondent's burden to show that he does not have an LBI. Further, I note that this information would be in the possession of Respondent.[28]

Respondent did not call Foley or Roth to testify about the use of former strikers as escorts. Respondent did not offer any documentation of the purported directive that former strikers could not be used as escorts. Respondent did not offer any testimony as to the date of this purported directive relating to escorts. For aught that appears in the record the laborer/escort position was open and available for a long time after Hopkins declined it. At the very least it was open on August 14 when Respondent advertised for an employee to fill this position. Respondent did not offer any testimony showing why the security of Plum Island would be compromised by recalling a former striker to a position with Respondent. Respondent is in possession of many written directives relating to the security and staffing of Plum Island and the failure to provide more than hearsay testimony about the laborer/escort position is significant. Certainly the record is devoid of evidence that Occhiogrosso was anything but a satisfactory and dedicated employee. As Raynes testified, Respondent has no reason why the position was not offered to Occhiogrosso. Although Raynes suggested that if Occhiogrosso did not have an LBI it would take him one year to obtain it, Respondent advertised on August 14, 2003 for someone who could obtain clearance with the USDA. If it really took one year to get the clearance Respondent would have advertised for someone who already possessed the LBI.

Respondent's brief argues that the laborer position held by Occhiogrosso and the new laborer/escort positions were not substantially equivalent. First, I note that Raynes did not testify to this effect. In fact, Raynes said the position was offered to Hopkins, another laborer. Second, Raynes emphasized that when the proposed laborer/escort employee was not acting as an escort that employee would be fulfilling laborer duties. Third, Raynes said he had no reason why the position was not offered to Occhiogrosso. Thus, Respondent's own witness did not assert that Occhiogrosso was unqualified for the position.

I have found above that Raynes was not a reliable witness and the lack of specificity in his testimony about the laborer/escort position does not inspire confidence. I do not credit Raynes concerning the failure to continue the laborer/escort position after it was declined by Hopkins. The lack of documentation in a case replete with documentary evidence of orders from the Government is significant. I find that the record does not reliably establish why after Hopkins declined the recall offer the position was not offered to Occhiogrosso. I shall therefore rely on Raynes' admission that he has no reason why the job was not offered to Occhiogrosso. I find that Respondent violated Section 8(a)(3) of the Act by failing to recall Occhiogrosso.

2. Charles Bumble

Charles Bumble began work for Respondent in February 2001 as an ordinary seaman. His duties were to load and unload passengers, mail and freight and to transport passengers from the vessel to the administration building on Plum Island. He assisted with the general safety, cleanliness, and maintenance of the vessel. Bumble testified that L.B.&B. employed persons in the title of ordinary seaman and ablebodied seaman. The job duties of employees in both of these titles while working for Respondent were identical, but there was a $6 differential in pay under the collective-bargaining agreement. Employees in the title ablebodied seaman earned more than those in the title ordinary seaman. Bumble testified that pursuant to requirements for licensure by the United States Coast Guard there are differences in the attainments of an ordinary seaman and an ablebodied seaman. To be recognized by the Coast Guard as an ordinary seaman one must have fingerprints and a picture

[28] Jennifer Gross, the L.B.&B. human resources director testified that she maintains the Respondent's personnel files. She testified that Occhiogrosso was not offered the laborer/escort position. She gave no reason and no details.

taken, and one must have a drug test on file.[29] To obtain an ablebodied seaman card from the Coast Guard one must have served on a vessel at least 4 hours per day for 360 days, one must pass proficiency exams in various subjects and one must undergo a background check.[30]

Bumble is a member of Local 30. He was on strike and manning the picket line. Bumble wanted to return to work after the Union's unconditional offer but he has never been recalled to work by Respondent. Bumble testified that he has never resigned from his job with Respondent. Bumble stated that he never told anyone at Respondent he would not be returning and he never told Patty Browne that he was resigning.

On May 22, 2003, Bumble saw an ad in the "Suffolk Times" for an ordinary seaman position with Respondent. He called the telephone number for Plum Island and he spoke to Browne in personnel. According to Bumble's sworn testimony he told her he wished to return to work. Browne told Bumble that she "assumed" he had resigned. Bumble replied that he had not resigned. Then Bumble asked Browne whether his standing on the preferential hiring list would be affected. Browne replied that it should not affect his standing on the list and that his name would go on the list and he would be notified. Browne was not called to testify herein.

Bumble testified that sometime before the strike began he had requested 2 days of accrued vacation to be paid. This was the only vacation pay he requested. While Bumble was on strike in December 2002 or January 2003, a guard handed an envelope addressed to Bumble through the picket line. When Bumble reached home and opened the envelope he saw that it contained a check for vacation pay. Bumble was surprised to get a check because he had not asked for his vacation pay. On cross-examination by counsel for Respondent Bumble acknowledged that one could assume employment was terminated when vacation pay was given to an employee.

Jennifer Gross, the human resources director for L.B.&B., testified that Respondent offered the position of ordinary seaman to Michael Van Wyck with a starting date of June 20, 2003. He accepted the offer. Gross testified that she did not offer the position to Bumble because she had information that he had resigned in December. Gross did not produce any documentary evidence to show that Bumble had resigned, either in letter, memo, or payroll form. Raynes, who began working for Respondent in April 2003, testified that he did not know Bumble. He testified that Bumble resigned in December 2002. When asked how he knew this Raynes stated that Bumble had turned in his security badge and had resigned in person to the then project manager. Raynes did not know the date that Bumble turned in the badge. He said he heard about Raynes' resignation from "the HR department . . . it probably came through Patty Browne." Although Raynes stated that he saw a file indicating that Bumble had been paid accrued vacation and that his security had been revoked because he turned in his badge, he said there was no letter of resignation and no memo from anyone in the file, including Browne, that Bumble had resigned. Respondent did not produce the purported file described by Raynes.[31]

I observed that Bumble testified forthrightly and in a confident manner. He was cooperative on cross-examination. I shall rely on Bumble's testimony. I find that Bumble telephoned Browne and asked for a job as an ordinary seaman. I find that Bumble told Browne that he had not resigned, and I credit Bumble's uncontradicted testimony that Browne told him it should not affect his standing on the preferential hiring list that she had previously assumed that he had resigned. I credit Bumble that Browne assured him that he would hear from Respondent. It is clear that Respondent has no letter, memo, or other documentary evidence that Bumble resigned his employment. If this evidence were in Respondent's possession then it would have been produced. I have found above that Raynes is not a reliable witness. Although Raynes, who was not present when the events occurred, testified that Bumble had resigned verbally and turned in his badge, this is hearsay of the most obvious kind. Respondent did not produce the witnesses who could testify to the turning in of the badge or the oral resignation. Thus, I find that Bumble, a striker who had not resigned from Respondent's employ, should have been recalled to his former position of ordinary seaman. Respondent violated Section 8(a)(3) of the Act by failing to recall Bumble.

3. Arthur Siemerling

Arthur Siemerling testified that he had once worked part time as a plumber for Burns and Ray, a predecessor Plum Island contractor to Respondent. When he quit this employment he was told that he should come back to work when he was available. Siemerling has a sea card issued by the Coast Guard. He does not hold Coast Guard ablebodied seaman certification. Siemerling has sailed on military ships and he was on duty in the Persian Gulf War.

Siemerling returned to work on Plum Island in 1995 when he was hired by Transportation Manager David Henry.[32] Siemerling testified that Henry hired him at the Ablebodied Seaman rate rather than the lower Ordinary Seaman rate because he had many years of experience and he had sailed transglobally.[33] Siemerling worked for 7 years, embarking daily from Orient Point, until he went out on strike. His duties included starting up the ferry, loading cargo and passengers, checking ID badges, assisting in the wheel house and maintaining the vessel. Siemerling testified that at Plum Island there is no difference in the duties performed by employees paid at the level of ordinary seaman and ablebodied seaman.

Siemerling testified that he was on strike with the Union and that he was willing to return to work although he was never recalled by Respondent.

[29] After fulfilling these requirements a person obtains a sea card, the document held by an ordinary seaman.

[30] Bumble's ablebodied seaman application was pending with the Coast Guard at the time he testified herein.

[31] Respondent introduced into evidence a letter dated March 4, 2003 from former employee Jack Seves stating that he had obtained a new job and was resigning his employment with Respondent. Seves asked that his accumulated vacation pay be sent to him.

[32] Henry was not called to testify herein.

[33] The collective-bargaining agreement shows that as of October 1, 2000, the ablebodied seaman was paid an hourly rate of $17.58 and the ordinary seaman was paid the rate of $12.64.

Siemerling testified in a forthright manner and he was cooperative on cross-examination. Siemerling's testimony was uncontradicted on the record. I shall rely on Siemerling's testimony.

The record shows that Respondent hired the following new employees to work in the position of ordinary seaman at a rate of $14.02 per hour: Timothy Hermance to start work on May 27, 2003, Michael Van Wyck to start on June 20, 2003, and Christine Brown to begin work on July 16, 2003.

Raynes, who is a graduate of the U.S. Merchant Marine Academy, testified that before the strike Respondent staffed its boats with a master and one ablebodied seaman and one ordinary seaman. On May 19, 2003 Raynes received a letter from Dennis Foley, the USDA administrative contracting officer stationed on Plum Island. The letter stated that there was "a potential overrun in marine labor." The letter said that, "To help control these costs . . . we should only incur costs for Masters and Ordinary Seaman on this contract."[34] Raynes did not give any information whether during the strike and before May 19, Respondent had continued to employ ablebodied seamen. Foley's letter seems to suggest that there were still ablebodied seamen on the payroll.

When Respondent began recalling striking employees, Raynes testified, he did not offer an open ordinary seaman position to an unrecalled ablebodied seaman. However, upon the direction of counsel for Respondent, he then offered positions as an ordinary seaman to the following employees who had been paid at the ablebodied seaman rate before the strike: John Eberhardt, Bernard Patinaude, Albert Letavec.[35] Raynes testified that although the Coast Guard recognizes the ordinary seaman title as a "walk-on" position, it is Respondent's practice to require some experience in the ordinary seaman job because it is necessary to have a person who knows how to handle ropes and lines. Raynes said that an employee who is an ablebodied seaman can perform the ordinary seaman work for Respondent.[36] Respondent offered no testimony or evidence to show why Siemerling was not recalled.[37] Raynes did not discuss Siemerling in his testimony. Raynes stated that when deciding on which employees to recall he had not consulted with Transportation Director Henry, he only consulted with "Human Resources." Raynes testified that in deciding which employees to recall he only checked to see what an employee's job title was; he did not look in the personnel file to check the employee's qualifications.

As noted above, I do not find that Raynes is a reliable witness. Furthermore, Raynes was hired in April 2003, and has far less time on the island than the employee witnesses who testified in the hearing. Certainly, it would have been more helpful to hear what Henry had to say about manning practices and the mechanics of the recall procedure.

The testimony of Bernard Patenaude, discussed below, also confirms that the normal duties of an ordinary seaman and an ablebodied seaman working at Plum Island for Respondent are the same duties.

I find, based on the testimony of Siemerling, Bumble, and Patenaude, that the U.S. Coast Guard will issue a sea card to a person upon the taking of a picture and fingerprints and submission of a drug test. This qualifies the holder of the sea card as an ordinary seaman. The U.S. Coast Guard will issue an ablebodied seaman ticket to a person who has performed duties on a vessel at least 4 hours per day for 360 days, who has passed certain proficiency exams and who has undergone a background check.

I find, based on the testimony of Siemerling, Bumble, and Patenaude, that there is no difference in the duties assigned to employees in the titles ordinary seaman and ablebodied seaman by the Respondent at Plum Island. I find that the two titles are used to provide different levels of pay to employees who are performing the same work. It is clear that Respondent has employed people holding only an ordinary seaman card from the Coast Guard and has paid them at the rate of an ablebodied seaman based on skill and experience.

Respondent's brief argues generally that there are differences between an ablebodied seaman and an ordinary seaman. As discussed above, this is true as far as the Coast Guard requirements are concerned. But this is patently untrue as far as the practice at Plum Island goes where the evidence shows that employees working in each of these titles perform the same duties. At Plum Island employees who held only the ordinary seaman Coast Guard sea card were titled and paid by Respondent as ablebodied seaman. Thus, there is no connection between the qualifications and licensure as recognized by the Coast Guard and the duties as actually performed by Respondent's employees. For purposes of this Respondent the duties of employees paid under the collective-bargaining agreement at the ordinary seaman rate and the ablebodied seaman rate are substantially equivalent: indeed, they are the same. The only difference between the two titles is the pay attached to each title.

Respondent's brief suggests that this pay differential shows that the two jobs are not substantially equivalent. However, pay differential alone is not sufficient to render two jobs not substantially equivalent. In *New Era Electric Coop.*, 217 NLRB 477 (1975), cited by the Respondent, the Board found that two positions were not substantially equivalent where the employee with the higher pay had different duties, drove a truck, had an assistant and was on call for 24 hours. The lower paid title did not have these attributes and, unlike the higher paid title, had little or no overtime opportunities. Respondent's brief also suggests that it need not recall someone previously employed as an ablebodied seaman to an ordinary seaman position because the ticket holder would be overqualified. In *Oregon Steel Mills*, 291 NLRB 185, 192 (1988), cited by Respondent, the Board affirmed a finding that a striking "chemist" need not have been recalled to a "lab test report clerk" position. The ALJ said the striker was overqualified in that he was a professional and the open job was a clerical position. The clerical position described in the decision required "typing

[34] Foley did not testify herein.

[35] Of these three, only Letavec accepted the recall.

[36] Raynes did testify that there was a difference in the skills of an ablebodied seaman and an ordinary seaman, but this was in the context of Coast Guard requirements and not specifically directed to practices in manning the boats at Plum Island.

[37] I am unable to find a reference to Siemerling in Respondent's brief.

skills." Although the requirements for a chemist were not set forth, I assume that at least a baccalaureate degree was required. Again, Respondent has not shown that there is any difference in the actual duties and actual skills required of its employees in the ablebodied seaman and ordinary seaman titles. There may be a difference in Coast Guard credentials but that difference was not recognized in hiring and in the actual practice on the job. That the formal credentials were not related to the title in which the employee was hired is illustrated by the testimony of Siemerling. Finally, in *Rose Printing Co.*, 304 NLRB 1076, 1077 (1991), cited by Respondent, the Board held that strikers are not entitled to be recalled to any jobs for which they are qualified, strikers are only entitled to be recalled to substantially equivalent jobs. Here, the evidence shows that Respondent's practice with respect to hiring and assigning job duties to the two titles at issue makes the positions substantially equivalent.

I find that respondent violated Section 8(a)(3) of the Act by failing to recall Siemerling to an open position as an ordinary seaman.

4. Ferry boat starting point

Before the strike at least one boat was docked overnight in Old Saybrook and began its run from the Connecticut shore. This enabled the crew members to begin their work day in Connecticut. At the time of the hearing the first boat from Connecticut left at 6:15 a.m. The last boat from Plum Island to Connecticut departed at 10 p.m. Before the strike the first boat from Orient Point to Plum Island was at 5:30 a.m. At the time of the hearing the first boat left Orient Point at 5:15 a.m. This boat dropped a crew on Plum Island and proceeded to Connecticut. The last boat from Plum Island to Orient Point departed at 11:30 p.m. The boats are manned by employees in two shifts.

Raynes testified generally that after the strike Respondent did not keep a boat overnight in Connecticut and that Respondent tried to hire employees who would be available first thing in Orient Point. However, Raynes also acknowledged that Respondent employs crew members who reside in Connecticut. Ken Zeldon, Chris Mitchell, and Rich Chalaki are Connecticut residents employed in the title ordinary seaman. They get on the boat in Connecticut at 6:15 a.m. and return at 4:15 p.m. A master identified only as "Charles" resides in Connecticut as well. Furthermore, Transportation Director Henry resides in Connecticut and he ran the boats during the strike and for a period following the strike.

Respondent did not provide any testimony to show why a boat is no longer kept in Connecticut overnight so that ferry crew members who reside there may have access to the earliest boat. Raynes began work long after the Respondent ceased docking a boat in Connecticut overnight. Transportation Manager Henry did not testify herein about why this decision was made and who made it. The record is therefore devoid of any competent evidence as to a legitimate and substantial business reason for making this change. As will be seen below, this change had an adverse effect on the recall rights of striking employees as implemented by Respondent.

5. Arthur Kerr

Arthur Kerr testified that he worked for Respondent as an ordinary seaman and relief captain from January 26, 2001 to August 14, 2002.[38] Kerr testified that he holds the following licenses from the Coast Guard: ablebodied seaman, 500-ton mates license and 150-ton masters license. Kerr lives in Norwich, Connecticut. When he was performing ordinary seaman duties he would get the boat ready to sail from Old Saybrook, check the oils and fluids and see to the cleanliness of the boat. Kerr was responsible for safety on the vessel and for checking the ID cards of passengers as they boarded. At Plum Island Kerr tied up the vessel, supervised the unloading and drove the passengers to the buildings on the island. Kerr worked the 7:30 a.m. to 5:30 p.m. shift. Kerr testified that he was a regular part-time master for Respondent. Once or twice a month he operated a vessel when the full-time master was absent due to vacation or sick leave. On these occasions he completed the four to six daily scheduled runs.

Kerr, a member of Local 30, went out on strike. While on strike, Kerr supported himself with two jobs. He worked part time as a master for Camelot Cruise Lines on the Connecticut River. Kerr was paid $75 per 3-hour trip. Kerr also had a job for a company called Cross Sound Ferry as an ablebodied seaman on the regular run from New London to Orient Point. He was paid $10.77 per hour. The schedule for this ferry is issued once a month. Once the schedule comes out the employees with scheduled runs are responsible to fulfill their obligations.

Kerr received a recall letter from Respondent dated May 7, 2003. The letter, signed by Raynes, offered Kerr a full-time ordinary seaman position. It stated that Kerr must contact Patty Browne within 5 working days of delivery of the letter. The letter continued as follows:

> You must also complete two pre-employment drug tests . . . as well as return the release authorization form within 2 days of receipt of this letter. The authorization form must be faxed to Patty Browne. . . . A return to work date will be established by the Company upon successful completion of the drug/alcohol test and criminal background check. Failure to respond within the time frame outlined above will be considered as a voluntary resignation of employment. . . .

Kerr testified that after he received the recall letter, "I faxed Patty Browne the security clearance and I did the drug test and I talked with Patty Browne and told her that I needed two weeks from my present employer." Kerr repeated that within 5 days of receiving the letter he spoke to Browne by telephone stating that he wished to return to work and that he had to give 2-weeks notice to his current employer.[39] Browne told Kerr that he had to telephone her within a short time because she needed a date when he would report for work. Kerr said, "I am calling you now." Kerr, who was speaking to Browne from

[38] The formal title for the captain of a ship is "Master." This is the title employed by the Coast Guard. The evidence shows that the master commands the ship, is responsible for everything on the ship and that all the crew members work for him or her.

[39] Kerr testified that it is common courtesy to give 2 weeks notice to an employer.

aboard ship, did not have a calendar before him. He informed Browne that he would give notice and that he would report "two weeks from today." Browne said, "OK." Kerr recalled the start date they agreed upon was about May 21. Kerr testified that he telephoned Browne again in a few days. Browne told Kerr that he had exceeded the time limit and that he had been passed over.[40]

I note that the excerpts of Kerr's testimony given in Respondent's brief are misleading and incomplete. In addition, and unfortunately, the reporting service in the instant case has not provided a good record despite two tries. However, I observed Kerr very carefully while he testified and despite the omissions and mistakes in the record I am confident that my summary of his testimony is accurate.

Kerr testified that when he spoke to Browne he asked for a position that originated from Old Saybrook but Browne told him that Respondent no longer docked its ferries there and she could only offer him a position out of Orient Point. Kerr told Browne that he would accept the position. Although Kerr lives in Connecticut he had friends in Orient Point and he could stay overnight with them. Kerr had also thought of moving to Orient Point. He had not done anything "active" about making the move.[41]

On cross-examination Kerr agreed with counsel for Respondent that it would take many hours for him to drive from Connecticut to the East End of Long Island. The way to get from his home to Orient Point is by boat. Kerr emphasized, "I wanted to get back on the island." He would have made the appropriate arrangements for a full-time position.

I note that Respondent employs Connecticut residents to man its boats. As stated above, Zelden, Mitchell, and Chalaki are employed in the title ordinary seaman. Further, Raynes testified that a master named "Charles" resides in Connecticut.

Kerr testified that he would have accepted either a full-time ordinary seaman or a full-time master position. Kerr asked Browne about the open master's position. Browne told Kerr that Respondent wanted someone from New York for the master's position and that Respondent would not give the Master's position to Kerr. Kerr testified that during the strike Transportation Manager Henry had operated the boats. Henry lives in New London, Connecticut. About 35 or 40 scientists commute to Plum Island from Connecticut. Raynes is a Connecticut resident as well.

As I observed Kerr testifying I formed the impression that he was an exceptionally truthful and guileless witness. Kerr told the truth without first stopping to consider whether the answer was favorable to one side or another. Kerr was cooperative on cross-examination and willingly answered all questions put to him, even when those questions were confusing and unclear. I shall credit Kerr's testimony.

The General Counsel asserts that Kerr should have been given a job as an ordinary seaman or as a master, a position for which he was qualified and which he had performed once or twice a month while he worked for Respondent.

Raynes testified that Respondent recalled Kerr but that he never made a commitment and he did not return his background check information timely and he did not have the blood test done within the 2-day time period specified. Raynes acknowledged that Kerr had telephoned Browne within the 5-day time limit. As set forth in great detail above, I have found that Raynes is not a credible witness.

Browne did not testify herein and Kerr's testimony that he fulfilled all the requirements of the recall letter are therefore uncontradicted. Although Raynes testified generally that Kerr did not send in his forms on time, Raynes is not the keeper of the records and he is not the person to whom the forms were to have been sent. Raynes did not produce any memoranda or files that would show how Raynes obtained the information that Kerr was not timely in his submissions.[42] In short, Raynes' testimony about Kerr's purported untimeliness was arrant hearsay and I shall disregard it. Furthermore, Jennifer Gross testified that she is director of human resources for L.B.&B. "which is where we maintain records." Gross testified that Respondent offered Kerr an ordinary seaman position. She did not offer any documentary support for the proposition that Kerr was untimely in submitting the forms for the recall process. Significantly, Gross did not testify that Kerr was indeed untimely: she said absolutely nothing about his recall procedure. It would have been the work of a moment for Gross to produce the records in her custody to confirm Raynes' hearsay testimony, but she did not do so. I therefore draw the permissible inference that Respondent's records do not support its arguments herein.

Gross also stated that Respondent did not offer the position of full-time master to Kerr. A position as full-time master was offered to Phillip Karlin who began working September 15, 2003.

I note that, as set forth above, on May 22, 2003, Respondent placed an advertisement for ordinary seaman. This would have been around the date Kerr said he would start work and just days after Kerr spoke to Browne when she informed him he had been passed over and Kerr told her that he had given notice to his employer. The record shows further that Respondent hired as an ordinary seaman Timothy Hermance on May 27, 2003, Michael Van Wyck on June 20, 2003, and Christine Browne on July 16, 2003.

Raynes admitted that Kerr telephoned Browne within the five-day time limit. I find that Kerr timely completed the requirements for his recall dated May 7, 2003, and that when Browne informed Kerr that he had been passed over Respondent violated Section 8(a)(3) of the Act.

Raynes testified that management personnel David Henry and Steven Jester continued to operate the ferries after the Un-

[40] Kerr testified that he gave notice and gave up his job with Cross Sound Ferry, but that he was then able to go back to work for them but only on a reduced basis.

[41] I reject the notion that in addition to giving up his job Kerr should have immediately sold his house to prove that he was serious about working for Respondent.

[42] The only way that Respondent itself could have ascertained that Kerr's forms were not received timely was to look at the forms for receipt stamps or to look on some other record maintained to show when forms are received. If this information did not exist then Raynes' testimony was patently false. If the information did in fact exist then the failure to produce it leads me to conclude that it would not have paralleled Raynes' testimony.

ion's unconditional offer to return to work on March 21, 2003.[43] Raynes stated that the first recall letter for a master position did not go out until May 15, 2003.[44] He did not explain why Respondent waited 2 months to recall strikers to this position. The record shows that Respondent placed ads in various media for the master position on May 18, June 15, and August 14. 2003. In addition, an ad was posted on the internet for which the record does not contain a date. None of these ads specified that the individual must live on Long Island.

Respondent did not offer a master position to Kerr despite the fact that he had regularly worked full shifts as a master once or twice a month during his employment with Respondent. Kerr is licensed as a master and is thus qualified for the job. No witness on behalf of Respondent testified that Kerr was not qualified or experienced. In May, Kerr had asked Browne about the open master's position and she had replied that Respondent would not hire him for that position because he did not live in New York. Browne did not testify herein. The record contains no explanation by any of Respondent's witnesses why it would recall Kerr to an ordinary seaman position but not to a master position knowing that he resided in Connecticut. The record is clear that both the ordinary seaman and the master position were to begin duty in the morning at Orient Point. The record is also clear that Kerr had given notice to his employer in Connecticut and that he was preparing to return to work for Respondent from a New York base.

The Respondent's brief argues that Kerr's former job as an ordinary seaman is not substantially equivalent to that of a master. That is not the issue here. Respondent also urges that it has only a duty to return Kerr to his former job and not to any other job he might be qualified to perform, citing *Rose Printing*, supra. The facts here are unlike the facts in *Rose*. Here the uncontradicted testimony shows that Kerr regularly performed the job of master for full shifts once or twice a month throughout his employment. Respondent did not offer any testimony to contradict Kerr's statement that he worked as a "Relief Master." Kerr testified that Browne gave only one reason why Respondent would not offer him the job of master—that he did not reside in New York. Browne did not say he was not qualified, that he did not have enough experience or that he had not worked in that title for Respondent. In summary, Respondent did not offer any substantial and legitimate business reason why it did not recall Kerr to the position of master after he expressed his desire to work in that position. I find that Respondent violated Section 8(a)(3) of the Act by failing to recall Kerr to the position of master.

6. Bernard Patenaude

Bernard Patenaude worked at Plum Island from August 1997 until he went on strike. Patenaude was employed as a part-time ablebodied seaman and a part-time master. Patenaude has an ablebodied seaman ticket from the Coast Guard and he has held a 1600-ton masters license for the past 24 years.

Patenaude testified that employees of Respondent who work in the title of ordinary seaman and ablebodied seaman perform the same duties on board the vessels. Patenaude confirmed the testimony of other witnesses that the Coast Guard licensure requirements for the two titles are different.

Patenaude is a resident of Rhode Island. He is a full-time firefighter in Cranston, R.I., a location 1 hour and 15 minutes away from Old Saybrook. Because of the compressed schedules commonly worked by firefighters, Patenaude was able to work 3 or 4 days a week for Respondent. Each shift on the boats lasted from 10 to 16 hours per day. He usually worked 2 days per week as a master and 1 day as an ablebodied seaman. He worked a 4-day week occasionally to cover for other employees. Patenaude's 1600-ton license qualifies him to run every one of the ferries to Plum Island.

Patenaude testified that before the strike one of the ferries was tied up every night at Old Saybrook. Once the strike began Respondent no longer kept a boat overnight in Connecticut. Respondent sought to elicit testimony from Patenaude on the reason for this change. Of course, Patenaude had no information on the motivation. As noted above Respondent presented no witness to testify why it no longer followed the longstanding practice of keeping a boat tied up overnight in Connecticut, and why it eliminated the practice of permitting certain employees to ride that boat to get to their work stations at the beginning of their shifts.

Patenaude testified that he was originally classified as an ablebodied seaman by L.B.&B. Later his classification was changed to part-time master. Patenaude testified that "as a gesture of good will for the company and to the Government I went back to AB, which is a cut in pay." This happened about 6 months before the strike. Patenaude explained these changes by noting that although he began working in the title ablebodied seaman he was also being used as a master. The company was about to hire as a part-time master an individual who was not flexible and would not work as an ablebodied seaman when required. The Company then offered the position of part-time master to Patenaude due to his seniority. Patenaude worked as a part-time master for a while. At some point the company told him that it needed him to work some ablebodied seaman shifts. If he worked these shifts while holding the title part-time master he would have to be paid at the master's rate for all his work. Patenaude agreed to revert to the title of ablebodied seaman in order to save money. The new arrangement permitted the employer to pay him as an ablebodied seaman when he performed those duties and to pay him at the higher master rate when he performed the higher duties.[45]

Respondent's brief urges that Patenaude only worked sporadically as a master. The record is contrary: before the strike Patenaude spent twice as much time working as a master than as an ablebodied seaman. Respondent's brief also relies on the fact that Patenaude's formal title was ablebodied seaman to urge that he is not entitled to be recalled as a master. Respondent thus seeks to take advantage of a loyal employee's cooperative attitude and his patriotic willingness to save the Government money by working at a lower rate when he performed ablebodied seaman duties. I shall refrain from further comment on this position.

[43] The record does not reveal Jester's title.

[44] This was an offer to Richard Gibbs. He did not respond.

[45] As of October 1, 2000, a master earned $21.37 per hour.

Patenaude received a recall notice dated August 21, 2003 which stated, in pertinent part:

> [T]here is a full time Ordinary Seaman position available. . . . This position will require that you report to work and end your day at the Orient Point, New York dock. You will not be ferried from the Connecticut dock to begin work.

Respondent presented no testimony to explain this offer. Thus, there is no explanation of the stated condition that Patenaude could not take the boat from Connecticut before his shift started. There is no testimony what time his shift would have started. No one testified as to any substantial and legitimate business reason why Patenaude could not be offered his former working conditions.

Patenaude turned down the August 21 offer in a letter addressed to Raynes. Patenaude stated that he could not accept the offer because it originated out of Orient Point. He said that he wished to be considered for any other position, especially a part-time position out of Connecticut. Patenaude detailed his employment history in this letter to Raynes. He informed Raynes that he had assisted in maintaining the vessels and he had upgraded systems and equipment on the vessels, thereby saving the Government thousands of dollars by completing the tasks in-house. Patenaude listed his firefighter skills and certifications, including shipboard firefighting certifications, HAZMAT, and EMT. He expressed the belief that by being available part-time "I can save many overtime dollars by filling spots for vacationing and sick employees."

Patenaude testified that he would have considered a full-time master position out of Orient Point if it had been offered to him.

I observed that Patenaude's demeanor as he testified was impressive. He took pains to consider the questions and answer accurately. I credit him and I shall rely on his testimony.

As discussed above, Respondent did not offer any testimony to show why it was not able to offer Patenaude a substantially equivalent position, that is a part-time job where he worked 3 or 4 days as a master or as a seaman. During August 2003, Respondent was still advertising for a full-time master. Furthermore, those ads did not specify that the successful employee must be a New York resident rather than a Connecticut resident and the ads did not contain the condition that the employee would not be ferried from Connecticut. As stated above, Respondent continued to use managerial personnel to operate the ferries rather than recalling qualified strikers to the master position.

I find that by failing to offer Patenaude his former job or a substantially equivalent position Respondent violated Section 8(a)(3) of the Act.

7. Albert Letavec

Albert Letavec testified that he began work on Plum Island in 1996 or 1997 as an ablebodied seaman.[46] Letavec has an ablebodied seaman card and is the holder of a third mate unlimited license and a radar license. Letavec testified that the third mate unlimited license is equivalent to a 100-ton master's license. Letavec testified that he is qualified to operate all the ferries on Plum Island. Letavec has in fact operated all three of these boats. While he was employed by L.B.&B. Letavec acted as a master at least 32 hours per week and was paid at the higher master rate. As discussed below, Letavec's testimony is uncontradicted by any competent evidence and I shall credit him.

Letavec testified that when he worked for L.B.&B. the ordinary seaman and the ablebodied seaman performed the same duties.

Raynes acknowledged that Letavec was legally qualified to operate the ferries as the holder of a 100-ton license. Raynes said, "under the Certificate of Inspection . . . then that license would be good." When asked about recalling Letavec as a master, Raynes testified that he did not look in the personnel file to see what qualifications Letavec possessed; he only looked at his past position. Raynes did not consult with Transportation Manager Henry about Letavec.

Letavec was on strike with the Union. He was recalled as a full-time ordinary seaman by letter from Raynes dated September 5, 2003. Letavec replied in a letter dated September 9 to Raynes. The letter accepts the offer and asks that Letavec be considered for any openings as ablebodied seaman or master. Letavec returned to work on October 1, 2003.

Raynes testified that before the strike Letavec "occasionally" worked as a master. Of course, Raynes was not employed at that time and he offered no documents to back up his assertion. Once again, Raynes has given inaccurate testimony. Gross did not testify about the hours worked by Letavec as a master, and Respondent did not offer any relevant payroll records. Yet Respondent's brief states that Letavec worked as a master only "occasionally." Manifestly, the regular performance of a master's duties 32 hours per week out of a 40-hour week for 4 or 5 years is not "occasional."

The record shows that on September 15, 2003, Respondent hired Phillip Karlin as a full-time master. Respondent has not shown that it had a legitimate and substantial business reason for failing to offer this position to Letavec, who had expressed his interest and qualifications for this position in writing to Raynes on September 9, just days earlier.

I find that Respondent violated Section 8(a)(3) of the Act by failing to offer Letavec the open position of master in September 2003.

8. Virginia Soullas

Virginia Soullas testified that she was the chef on Plum Island from January 1998 until the strike commenced. She was responsible for planning, purchasing and preparing hot food and other food products. Soullas is a member of Local 30 and she attended two negotiation sessions with the Union. Soullas is willing to return to work on Plum Island but Respondent did not recall her.

Gross testified that Soullas has not been recalled to work. Instead, an existing employee has been promoted to the position of chef. Raynes stated that Respondent promoted Sharon McDowell from cook to chef and did not fill the cook position. He did not make this decision. Neither Gross nor Raynes testified as to any business reason for Respondent's action.

Respondent's brief states that at the beginning of the strike

[46] Letavec lives on Long Island.

there was no cook position, but that at some point Respondent employed both a chef and a cook. Respondent offered no testimony showing when the position of cook was created nor why that position was created. Respondent presented no testimony as to the duties of the "cook" and how that position differed from "chef." Respondent cites the collective-bargaining contract which list positions of "chef" and "food service worker." Respondent acknowledges that in April 2003, a vacancy arose in the chef position and that it promoted the cook rather than recalling Soullas.

Respondent states that its action is a lawful exception to the rule that an employer may not internally promote permanent replacement workers to open positions instead of offering those positions to strikers awaiting reinstatement. Respondent states that it may lawfully promote the cook in this instance because it has not hired a new employee to fill the position vacated by the in-house transfer. Respondent cites *Overhead Door Corp.*, 261 NLRB 657, 664–665 (1982). In that case the struck employer had hired production workers whom it then assigned to the plant security supervisor who needed more guards during the strike. When the strike tension abated the guard function was no longer necessary and the employees were transferred back to the production floor. This was found to be lawful with respect to striking production workers who indicated a desire to return to work after the replacement production workers were hired. It is significant that in *Overhead Door* the replacement employees were not promoted: they were transferred back to the jobs for which they had initially been hired. The Board in that decision made no decision concerning the promotion of replacement employees to vacant positions for which a striker had applied.

The ALJ in *Overhead Door* relied on two cited cases. In *Pillows of California*, 207 NLRB 369 (1973), the Board found that during the strike an employee's duties were divided up among various supervisors and replacement workers and the job no longer existed. Thus, a returning striker did not have to be offered a job which had been abolished prior to the offer to return to work. The Board found that the employer met its burden of "establishing the defense that the unreinstated striker was no longer necessary to the company. . . ." In *Kennedy & Cohen of Georgia, Inc.*, 218 NLRB 1175 (1975), the Board found no violation in the transfer of a former supervisor to a salesman's position after the striking salesman had offered to return to work. *Kennedy & Cohen* seems to be an anomaly and the Board has not disavowed an ALJ's statement that it has been overruled. *Randall, Burkart/Randall*, 257 NLRB 1, 5 (1981). Cases decided after *Kennedy & Cohen* have not followed that decision with respect to transfers within a plant. In *MCC Pacific Valves*, 244 NLRB 931 (1979), the Board rejected a position remarkably similar to the one advanced here by Respondent. In that case the employer did not offer their former jobs to unreinstated strikers, instead it posted the jobs for bidding by employees on the payroll. The employer argued that it had to "restructure internally" and that it was not adding additional people to its payroll. The Board, in a lengthy decision, emphatically rejected the ALJ's acceptance of this argument, and the Board held:

> It is, of course, well settled that an economic striker is entitled to full reinstatement to his former job or to a substantially equivalent job upon an unconditional offer to return to work . . . . [A]n employer must, when and if a job becomes available for which a striker is qualified, offer that job to an economic striker. An employer may refuse to reinstate a striker only if it shows substantial and legitimate business reasons for doing so. 244 NLRB at 933.

Here the employer has not met its burden to show why the position of chef should not have been offered to Soullas rather than to a person transferring from another title. Respondent did not present any testimony as to the duties of chef and cook, it gave no explanation for the creation and then abolition of the cook title (nor when this might have occurred). Therefore, it showed no substantial and legitimate reason for not reinstating Soullas to her position as chef when it became available after the unconditional offer to return to work. Respondent violated Section 8(a)(3) of the Act by failing to reinstate Soullas to the position of chef.

9. Martin Weinmiller and Robert Borrusso

The Plum Island wastewater treatment plant is certified by the New York State Department of Environmental Protection. In February 1996, the rating for the plant was fixed at 3A. The "A" signifies that the plant handles activated sludge. The certification manual provides that for a plant rated 3A the required grade of "Chief Operator" must be 3A and the grade of "Assistant/Shift Operator" must be 2A.

Martin Weinmiller has been employed on Plum Island since 1979. He has worked on the laboratory repair crew and as a boiler operator. From 1996 until the strike in August 2002, Weinmiller worked as an operator in the wastewater treatment plant and in the potable water plant. Weinmiller holds a water treatment license and a 1A sewage treatment license. Weinmiller became the union shop steward in 1996. He was not recalled after the strike.

Weinmiller described his two jobs. The treatment of waste water involves treating sewage to remove certain substances, extracting and decanting solids and drying the solids in beds. Drinking water is extracted from ground wells and treated before it is sent to be consumed on the island.

Weinmiller testified that he worked alone on certain weekends operating the wastewater treatment plant and the wells. On those occasions he was the only licensed operator for both the wastewater treatment plant and the potable water operation on the island.

Robert Borrusso worked at Plum Island from 1996. He operated and maintained the wastewater treatment plant, performing routine repairs and maintenance and testing the water. Borrusso also operated and performed maintenance on the decontamination plant.[47] Borrusso moved back and forth between wastewater treatment and decontamination. On certain occasions Borrusso was the only wastewater plant operator on the island. Borrusso holds a grade 2 wastewater treatment license. He has taken classes on the treatment of activated sludge and he would need a few more classes to obtain his 2A certification.

[47] No license is required to work as a "decon operator."

Borrusso is a union member. He was willing to return to work after the strike but he was never recalled.

Before the strike, Respondent employed three full-time workers to treat wastewater and potable water: Weinmiller, Borrusso, and Mark DePonte.[48] Their supervisor was Floyd Standish, who had the title chief wastewater treatment operator. Standish and DePonte did the required paperwork for the plant.

In an attempt to establish the New York State manning requirements for the wastewater treatment plant Respondent introduced its Exhibit 2 which consists of a number of pages dealing with water supply and wastewater treatment and other documents compiled by a predecessor contractor to Respondent. This exhibit is an incomplete assemblage of pages from various sources. The pages were not described on the record by a witness called on behalf of Respondent and one can only guess at what some of them mean. Clearly, many pages are missing from this exhibit and it does not provide a definitive answer to the question of manning the wastewater treatment plant. A section of this exhibit appears to consist of comments concerning proposed New York State regulations. One such comment provides that a regulation "*could* be modified as follows:"

> The chief operator or an assistant operator to be on site for at least four hours each and every day on which the [plant] is to be manned by operations staff, and during at least one shift on every such day.
>
> If the [plant] is manned during more than one shift, an assistant operator or a shift operator should be on site for at least four hours during every such shift.
>
> When an operator . . . not present . . . that operator should be required to be reachable by telephone within 30 minutes and capable of returning to the [plant] within two hours.

Another page of this document discusses how many hours per day the certified operator must be present at the facility and it concludes, "2 hours seems to be a generally acceptable duration." Another page of this exhibit shows that, in fact, a regulation has now been put into place providing that:

> Each wastewater treatment plant should be manned by an appropriately certified operator (chief or assistant/shift) a minimum of two hours per day each and every day.

I note that this enacted section does not contain the requirement that a certified operator be on duty during each and every shift.

The exhibit contains a listing of the duties of the "chief" operator. Because Respondent did not provide a complete exhibit there is no definition of "assistant/shift" operator nor a list of that person's duties. Further, the document does not set forth who else may be involved in manning a certified wastewater treatment plant.

Respondent's Exhibit 2 thus establishes that a chief or assistant/shift operator must be at the wastewater treatment plant a minimum of 2 hours per day each and every day. The exhibit introduced by Respondent does not establish that, aside from those 2 hours per day, the operating personnel at the plant must hold any particular grade certification.

From the above description of the exhibit introduced by Respondent it is clear that this record does not conclusively answer the question whether New York State regulations prohibit the Plum Island plant from being operated during a portion of the day by a person who does not have either the 3A chief operator's or the 2A assistant/shift operator's certification. Thus, Respondent has not established on the record before me that a person holding a 1A certification or a 2 certification is not lawfully permitted to operate the plant so long as a higher grade operator is present for at least 2 hours of every day.

Weinmiller testified that he was never instructed to upgrade his license to a 2A. He worked until the strike in August 2002 with a 1A license without any suggestion from Respondent that this was improper. Borrusso also worked until the strike with his grade 2 license and no one from management ever told him to upgrade his license to 2A or informed him that he needed further certification to remain employed.

Raynes testified that the chief wastewater plant operator and assistant were required to hold, respectively, a 3A and 2A license. Raynes acknowledged that when a vacancy arose for a wastewater plant operator the job was not offered to either Weinmiller or Borrusso. Raynes asserted that Respondent needed two 3A operators for the plant. He did not explain why this was necessary.

Gross testified that on June 9, 2003, a position as wastewater treatment operator was offered to Richard Wood with a start date of June 9, 2003. According to Raynes, Wood has a 3A license. The record shows that on May 27, 2003, the full-time position of "decon operator" was given to Frank Sistare. Raynes testified that Sistare is a floater who works in decontamination part time and in wastewater treatment part time. Raynes stated that Sistare holds a 2A license for wastewater treatment.

As discussed above, Respondent has not met its burden to demonstrate that it could not employ a wastewater plant operator who held less than a 3A or 2A license so long as a person with a 3A or 2A license was present for 2 hours a day. The record is incomplete concerning New York State requirements on this subject. Therefore, Respondent has not met its burden to show a substantial and legitimate reason for not recalling Weinmiller and Borrusso to wastewater treatment positions. This is especially so in view of the fact that before the strike Respondent was content to employ these two men without any suggestion that it was unlawfully operating the wastewater treatment plant.

I find that Respondent violated the Act when it failed to offer Borrusso the position of full-time decon operator on May 27, 2003. I also find that Respondent violated the Act by failing to recall Weinmiller and Borrusso as wastewater treatment plant operators. In the event that New York State regulations prohibit the employment of Weinmiller and Borrusso as wastewater treatment plant operators, Respondent may establish this fact during the compliance stage of the proceeding.

[48] DePonte apparently pled guilty to sabotage with respect to the wastewater treatment plant. There is no evidence of any kind that Weinmiller or Borrusso were present when the criminal act occurred nor that they played any part in it.

D. Alleged Refusal to Bargain

Gerald Devine is the Local 30 business representative assigned to the Plum Island bargaining unit. Devine testified that Respondent did not give notice and an opportunity to bargain to the Union when it eliminated the contractually established position of "Ablebodied Seaman," nor when it established the position of "escort" or "security work watch." The Respondent did not offer to negotiate the effects of these changes.

Respondent admits that it eliminated the "Ablebodied Seaman" classification contained in the collective-bargaining agreement. Respondent states that this action was taken in response to a May 19, 2003 directive from the USDA contracting officer. No testimony was offered that Respondent informed the Union of this directive or offered to bargain about its action before eliminating the position.

The record establishes that on May 7, 2003 Respondent offered a newly created position of "laborer/escort" to Deborah Hopkins. The record establishes that on August 14, 2003 Respondent ran a newspaper advertisement for a position called "Security Work Watch." It is undisputed that Respondent did not negotiate with the Union prior to establishing these two new positions.

The record shows that beginning on July 7, 2003, Respondent sent correspondence to the Union offering to negotiate with regard the decision and effects of the elimination of the ablebodied seaman position and the allocation of escort duties.

Counsel for Respondent sent a July 31, 2003 letter to counsel for the Union which stated, inter alia:

> [Y]ou are absolutely correct that NFS first offered to bargain with Local 30 regarding the decision and effects of the elimination of the Able-Bodied Seaman position and the allocation of the escort issues after the NLRB Regional Director decided to issue a complaint. The reason for this is simple: prior to the Regional Director's decision, NFS did not believe that its action constituted unfair labor practices.

Respondent's brief urges that the laborer/escort and security work watch positions were never really created and thus there could be nothing unlawful in failing to give the Union notice and an opportunity to bargain. However, it is clear that Respondent offered one position to Hopkins and advertised for applicants to another one, and I believe that this constitutes the creation of a position.[49]

Respondent asserts that the Union waived its right to bargain because it had actual notice of the elimination of the ablebodied seaman title and the issue of the escort/laborer position by May 30, 2003 when it filed a charge but that the Union did not request bargaining before filing a charge.

Respondent argues that on August 4, 2003, the Union waived its right to bargain in a letter from union counsel which stated:

> [I]t is my understanding that LB&B/North Fork Services Joint Venture no longer has a contract for maintenance and operations for Plum Island.
>
> Therefore, we request the name, address, and telephone number of the successor employer for the maintenance and operations for Plum island, as well as a contact person for this contractor.

I do not find that the Union's letter requesting the name of Respondent's successor contractor on Plum Island constitutes a waiver. Indeed, Respondent has not presented a rationale to support this position.

I do not find that Respondent was precluded from bargaining about the lower pay for the ferry crew. As set forth above, the only difference between an ablebodied seaman and an ordinary seaman on Respondent's payroll is the rate of pay. This is an economic issue and particularly well suited to negotiations. The Board's discussion in *Keystone Consolidated Industries*, 309 NLRB 294, 297–298 (1992), is applicable here.

It is well established that Respondent should have offered to bargain about any change in the unit before implementing those changes. *NLRB v. Katz*, 369 U.S. 736 (1962). However, if the Union was aware of the changes in sufficient time to engage in bargaining before implementation of the changes but did not request bargaining, then it has waived its rights. The filing of a charge does not excuse a failure to request bargaining. *Whirlpool Corp.*, 281 NLRB 17, 23 (1986).

I agree that the Union should have requested bargaining when it became aware of the changes in the unit relating to ablebodied seaman, and laborer/escort—security work watch. I find that the evidence in the record does not show that a request for bargaining would have been futile. The escort positions were not filled and the change in the ablebodied seaman rate was an issue relating only to pay. Respondent had not made a change in the nature of a fait accompli nor had it made clear that it would refuse to bargain over these subjects. Cf. *Keystone Consolidated Industries*, supra at 297. Although Respondent's letter of July 31 confirms that it did not believe that failing to bargain with the Union over the relevant matters was unlawful, that is not proof that the Respondent would have refused to bargain in the face of an actual request by the Union.

CONCLUSIONS OF LAW

1. By discharging James McKoy because he is a member of Local 30, International Union of Operating Engineers, AFL–CIO, and because he engaged in activities in support of the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

2. By failing to reinstate striking employees Francis Occhiogrosso, Charles Bumble, Arthur Siemerling, Arthur Kerr, Bernard Patenaude, Albert Letavec, Virginia Soullas, Martin Weinmiller, and Robert Borrusso to their prior positions or to substantially equivalent positions, Respondent has violated Section 8(a)(3) and (1) of the Act.

3. The General Counsel has not shown that Respondent violated the Act in any other manner.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an em-

[49] In fact, *Diamond Walnut Growers*, 312 NLRB 61, 70 (1993), cited by Respondent, sets forth that the announcement and posting of a unilateral change in a job requirement is unlawful even though the requirement was not actually imposed on employees.

ployee, it must offer James McKoy reinstatement and make McKoy whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent having failed to reinstate certain strikers to job vacancies, it must offer them reinstatement and make them whole in the manner described above, with interest. As discussed above, Respondent shall reinstate Martin Weinmiller and Robert Borrusso unless it can meet its burden to show at the compliance stage of this proceeding that New York State regulations prohibit their working at their former jobs.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[50]

ORDER

The Respondent, L.B.&B. Associates, Inc. and Olgoonik Logistics, LLC, a Joint Venture d/b/a North Fork Services Joint Venture, Columbia, Maryland, and Plum Island, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Local 30, International Union of Operating Engineers, AFL–CIO, or any other union.

(b) Failing to reinstate striking employees to their former jobs or to substantially equivalent jobs when vacancies arise in those positions.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer James McKoy full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Within 14 days from the date of the Board's Order, offer striking employees Francis Occhiogrosso, Charles Bumble, Arthur Siemerling, Arthur Kerr, Bernard Patenaude, Albert Letavec, Virginia Soullas, Martin Weinmiller, and Robert Borrusso reinstatement to their former jobs or to substantially equivalent jobs.

(d) Make James McKoy, Francis Occhiogrosso, Charles Bumble, Arthur Siemerling, Arthur Kerr, Bernard Patenaude, Albert Letavec, Virginia Soullas, Martin Weinmiller, and Robert Borrusso whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the Decision.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Plum Island, New York, copies of the attached notice marked "Appendix."[51] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 15, 2003.[52]

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 9, 2004

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

[50] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[51] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[52] The date of the first unfair labor practice I have found herein took place, by Respondent's admission, in April 2003, when Respondent promoted the cook to the chef position to which it should have recalled Soullas. Because Respondent did not provide an exact date in April when this occurred, I have selected a date in the middle of the month.

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 30, International Union of Operating Engineers, AFL–CIO, or any other union.

WE WILL NOT fail to reinstate striking employees to their former jobs or to substantially equivalent jobs when vacancies arise in those positions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer James McKoy full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make James McKoy whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of James McKoy, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL, within 14 days from the date of this Order, offer striking employees Francis Occhiogrosso, Charles Bumble, Arthur Siemerling, Arthur Kerr, Bernard Patenaude, Albert Letavec, Virginia Soullas, Martin Weinmiller, and Robert Borrusso reinstatement to their former jobs or to substantially equivalent jobs in the manner set forth in the remedy section of the Decision.

WE WILL make Francis Occhiogrosso, Charles Bumble, Arthur Siemerling, Arthur Kerr, Bernard Patenaude, Albert Letavec, Virginia Soullas, Martin Weinmiller, and Robert Borrusso whole for any loss of earnings and other benefits resulting from our failure to reinstate them, less any net interim earnings, plus interest.

L.B.&B. ASSOCIATES, INC. AND OLGOONIK LOGISTICS, LLC, A JOINT VENTURE D/B/A NORTH FORK SERVICES JOINT VENTURE